

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 259.

**WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN
ERROR,**

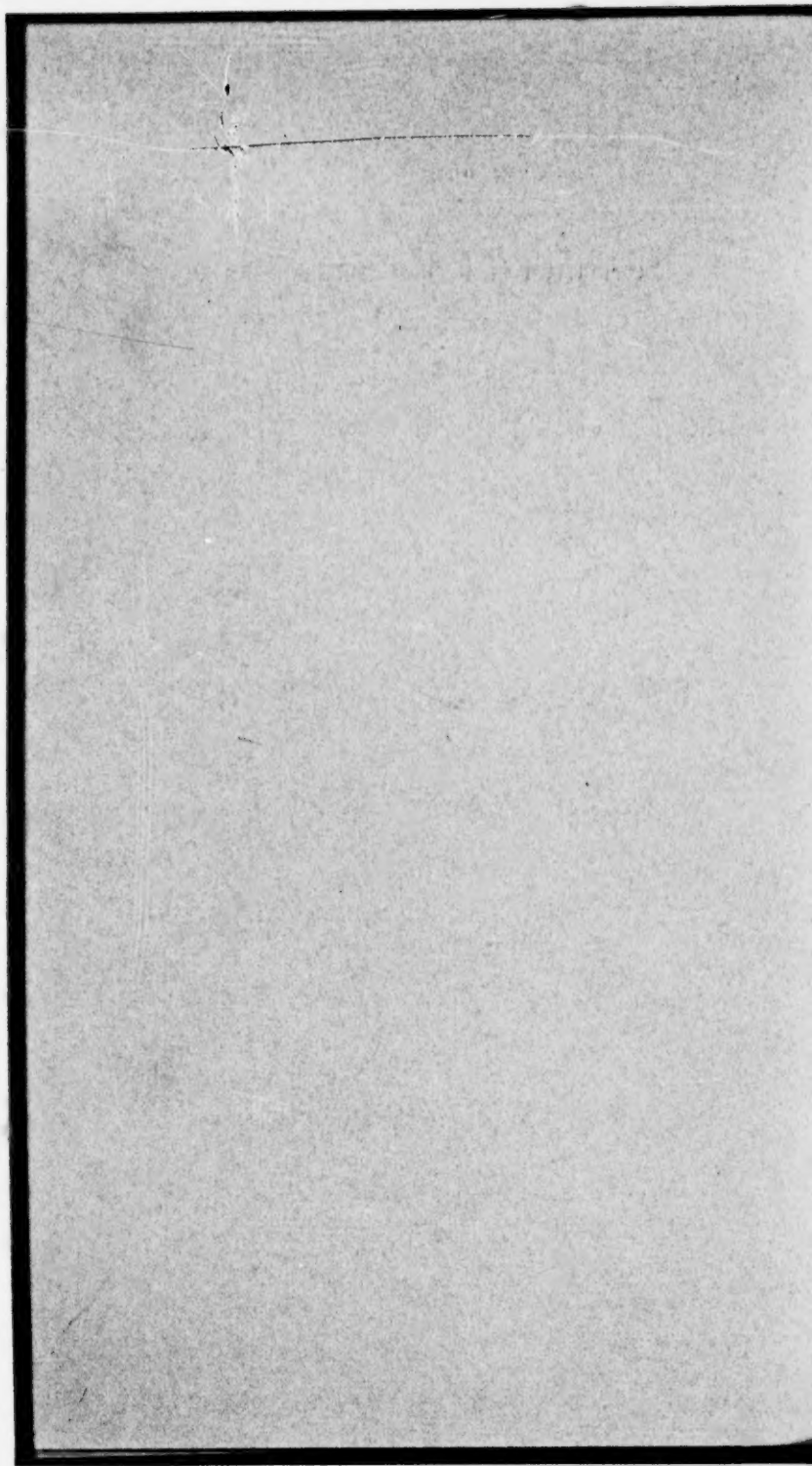
vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

**IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF KENTUCKY.**

FILED MARCH 18, 1921.

(28,166)



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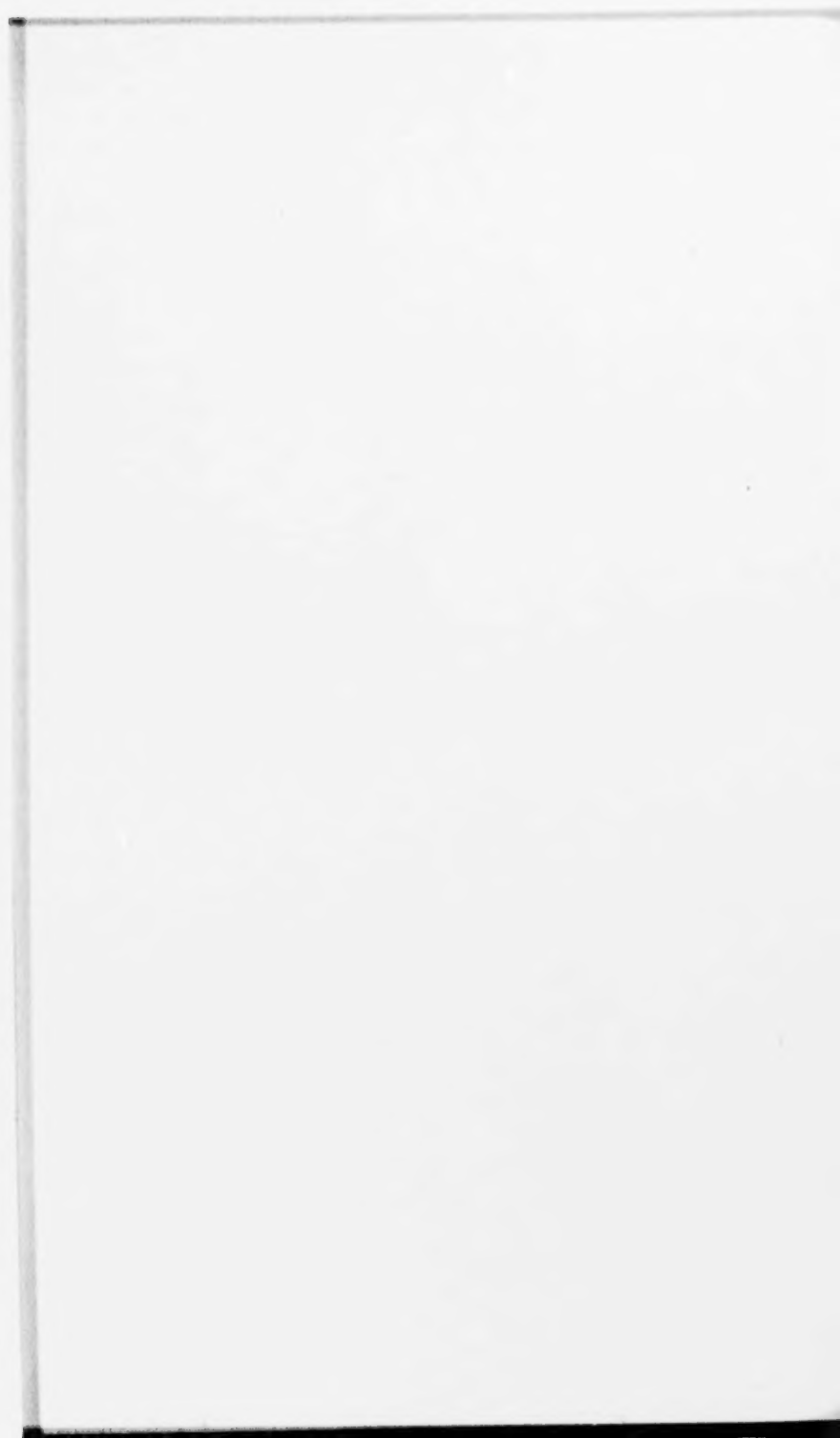
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1 TRANSCRIPT OF RECORD ON WRIT OF ERROR.

UNITED STATES OF AMERICA,

Western District of Kentucky, ss:

Record of the proceedings of the District Court of the United States within and for the Western District of Kentucky, in the cause and matter hereinafter stated, and the same being disposed of at a regular term of said court begun and held at the City of Louisville, in said District, on the second Monday in October, 1920, being the 11th day of said month, in the year of our Lord one thousand nine hundred and twenty and of the Independence of the United States of America the one hundred and forty-fifth, to wit: on the 22nd day of January, A. D., 1921.

Present: Honorable Walter Evans, Judge of the United States District Court for said District.

At Law.

No. 88.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff.

VS.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Be it remembered that said action was commenced on the 9th day of July, A. D., 1912, and proceeded to final disposition by judgment at the term and day above written, and during the progress thereof pleadings, papers, and opinions were filed, orders and proceedings of the court were made and entered, prior and subsequent to said final judgment, and during the regular terms and on the dates hereinafter stated, to wit:

2

Petition.

District Court of the United States for the Western District of Kentucky.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff.

VS.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, AND NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY Co., Defendants.

Petition.

Filed July 9, 1912.

The Western Union Telegraph Company, a corporation organized and existing under the laws of the State of New York, and a citizen

of said State, plaintiff in this suit, complains of the Louisville & Nashville Railroad Company, a corporation organized and existing under the laws of the State of Kentucky, and a citizen of said State and an inhabitant of the Western District of Kentucky aforesaid, and of the Nashville, Chattanooga & St. Louis Railway Company, a corporation organized and existing under the laws of the State of Tennessee, and a citizen of said State, and carrying on business in the Western District of Kentucky, where it has a principal office for the transaction of its business designated by it under the laws of the State of Kentucky.

Thereupon your petitioner says that this is a suit wholly between citizens of different States, and that the amount in controversy herein exceeds the sum or value of \$3,000, exclusive of interest and costs.

And your petitioner says that your petitioner, the Western Union Telegraph Company, is a corporation chartered and duly organized under the laws of the State of New York, with authority to sue and be sued, contract and be contracted with, and with power to own, construct, operate and maintain lines of electric telegraph, and to engage in the business of transmission by wire of dispatches, messages, news, intelligence and information, and the receipt and delivery thereof for compensation or hire in the State of New York and in all other States of the United States, including the State of Kentucky.

Your petitioner says that prior to the institution of this action, by resolution of its Board of Directors, passed at a duly called
3 meeting of said Board of Directors, held in the City and State of New York, at which meeting a majority of said Board was present and voted in favor of said resolution, it accepted the provisions of the present Constitution of the State of Kentucky in the manner and form provided by Section 570 of the Kentucky Statutes, and that a duly attested copy of said resolution of its Board of Directors was filed, prior to the institution of this action, in the office of the Secretary of State of the State of Kentucky, at Frankfort, Ky., and is now on file in said office.

Your petitioner says that the Louisville & Nashville Railroad Company (hereinafter called the Railroad Company) is a corporation organized under the laws of the State of Kentucky, with power to sue and be sued, to contract and be contracted with, and to own and operate lines of railroad in the State of Kentucky and other States, and that it now owns and operates lines of railroad in and through the counties of the State of Kentucky hereinafter named, and owns and operates lines of railroad between the several points in the several counties hereinafter named, and owns a right of way in and to the lands along the course of said railroad and its communicating branches heretofore secured to it in the State of Kentucky, and in the counties of said State hereinafter mentioned; and that the Nashville, Chattanooga & St. Louis Railway Company is a corporation as aforesaid having power to construct, maintain and operate a railroad.

Your petitioner states that for many years it has occupied the right of way and structures hereinafter described of the Louisville

& Nashville Railroad Company in the State of Kentucky, with its lines of telegraph, consisting of poles, wires, fixtures and appurtenances, under a contract with said Louisville & Nashville Railroad Company which will expire on the 17th day of August, 1912, and your petitioner desires to continue to occupy said right of way and structures, and to maintain and operate its said line of telegraph where now placed and located, or hereafter constructed, subject to such changes in location of such right of way as the necessities of the Telegraph Company or of the Railroad Company may require on and after the termination of said contract aforesaid, to-wit, on and after said 17th day of August, 1912.

Your petitioner says that it has accepted the Act of Congress of July 24, 1866, Title 65, United States Revised Statutes, Section 5263, et seq., and that by reason of its said acceptance it has the right to construct, maintain and operate lines of telegraph
4 through and over any portion of the public domain of the United States, and over and along any of the military or post roads of the United States which have been declared such by law; that by virtue of an Act of Congress approved June 8, 1872, 17 Stat., Section 201, all railways or parts of railways which were in existence at the time of the passage of said Act, or which thereafter may be in operation, are declared post roads; that by said Act of June 8, 1872, the right of way of the defendant, the use of which is sought to be condemned for the purposes and under the restrictions hereinafter named, is declared and established as a post road of the United States, and that your petitioner, by virtue of the Acts of Congress hereinbefore mentioned, has the right to construct, maintain and operate its telegraph lines along said right of way.

Your petitioner further states that by reason of its acceptance of said statute as aforesaid, it is under obligation to render certain services to the Government of the United States; that in order to properly fulfill its obligation to the Government of the United States, and to properly handle its business between the various points in the counties in the State of Kentucky, hereinafter named, and to properly handle its business between points in the State of Kentucky and in the States of Illinois, Indiana, Ohio, West Virginia, Virginia, Tennessee, Missouri and other States, and the larger cities of the United States, and the Republic of Mexico and the Central and South America Republics, it has been and will continue to be necessary to maintain and operate its telegraph lines along the right of way and structures of said defendant Railroad Company; and that it is to the interest of the Government of the United States, as well as the public generally, and of your petitioner, that your petitioner shall continue uninterruptedly in the full and peaceable enjoyment of the said railroad right of way as the most direct, safe and practical post-road or highway for the location of the telegraph lines and connecting wires above mentioned.

Your petitioner states that the said Louisville & Nashville Railroad Company is the owner of the property which is sought by this proceeding to be condemned for the use of your petitioner for the

purpose of maintaining and operating its line of telegraph as now constructed thereon, and of repairing, reconstructing and rebuilding said telegraph line as the necessities of said Telegraph Company may require, and of owning, maintaining and operating telegraph lines thereon, which telegraph lines your petitioner avers is
5 a public work or improvement, and that a material part of said property is situated in the County of Jefferson, in the State of Kentucky, and that the said Railroad Company has a depot located in the City of Louisville, in the said County of Jefferson and other stations along and on its line of railroad in said County of Jefferson.

Your petitioner further states that it does not seek by this proceeding to acquire the fee in and to any land included in the right of way of said Railroad Company, or in any of the structures of said Railroad Company, but by this proceeding seeks to condemn the right on and after the 17th day of August, 1912, to continue to occupy said right of way and structures now occupied by it with its poles, wires and lines of telegraph, and to maintain and operate its said lines of telegraph where now placed and located, subject to such change of location on such right of way as the necessities of the Telegraph Company or the Railroad Company may require, together with the right and easement to enter on and over the right of way of said Railroad Company for the purpose of repairing, rebuilding or reconstructing said telegraph lines along said right of way, which is more fully described as follows:

1. That portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company, now occupied by this plaintiff with a connecting line of telegraph from a point at or near where the right of way of the Main Stem of said Railroad Company intersects St. Catherine Street within the city limits of the City of Louisville, in the County of Jefferson, State of Kentucky, and on and along said right of way and structures of said Railroad Company in a general southwardly direction in and through the Counties of Jefferson, Bullitt, Hardin, Larue, Hart, Barren, Edmondson, Warren and Simpson, in the State of Kentucky, to a point where the right of way of said Railroad Company crosses the State line between the States of Kentucky and Tennessee on the southern boundary of Simpson County, Kentucky, at or near the station of said Railroad Company at Mitchellville, Tennessee. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Main Stem of said railroad, and all spurs and branches thereof, now occupied by the Telegraph Company, and contains approximately 139 miles of pole line.

6 2. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff with a connecting line of telegraph from a point commencing at or near the station of said Railroad Company at Bardstown Junction in Bullitt County,

Kentucky, and on and along said right of way and structures of said Railroad Company in a general southeasterly direction, in and through the County of Bullitt, County of Nelson, and County of Washington, to a point at or near the station of said Railroad Company at Springfield, in the County of Washington, Kentucky. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Bardstown & Springfield Branch, and all spurs and branches thereof now occupied by the Telegraph Company, and contains approximately 37 miles of pole line.

3. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff, with a connecting line of telegraph from a point commencing at or near the station of this defendant in the City of Shelbyville in Shelby County, Kentucky, and on and along said right of way and structures of said Railroad Company in a general southwardly direction in and through the Counties of Shelby, Spencer and Nelson, State of Kentucky, to a point at or near the station of said defendant Railroad Company at Bloomfield in Nelson County, Kentucky. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Bloomfield Branch, and all spurs and branches thereof now occupied by the Telegraph Company, and contains approximately 26 miles of pole line.

4. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff with a connecting line of telegraph from a point commencing at or near the station of this defendant in the town of Scottsville in Allen County, Kentucky, and on and along said right of way and structures of said Railroad Company in a general southwestwardly direction in Allen County, Kentucky, to a point where the right of way of said Railroad Company crosses the State line between the States of Kentucky and Tennessee on the southern boundary of Allen County, Kentucky. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Chesapeake
7 & Nashville Branch, and all spurs and branches thereof now occupied by the Telegraph Company, and contains approximately 10 miles of pole line.

5. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff with a connecting line of telegraph from a point at or near where the right of way of said Railroad Company intersects the head of Main Street in the city limits of the City of Louisville and the County of Jefferson, State of Kentucky, and on and along said right of way and structures of said Railroad Company in a general northeastwardly direction, in and through the Counties of Jefferson, Oldham, Henry, Carroll, Gallatin, Grant,

Boone, Kenton and Campbell, in the State of Kentucky, to a point at or near the station of said Railroad Company in the City of Newport, Kentucky, thence on and along said right of way through said City of Newport, Kentucky, to a point where the right of way of said Railroad Company crosses the Ohio River at the State line between the States of Kentucky and Ohio on the northern boundary of Campbell County, Kentucky, near the station of said Railroad Company in the City of Cincinnati, Ohio. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Cincinnati Division, with all spurs and branches thereof now occupied by the Telegraph Company, and contains approximately 108 miles of pole line.

6. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company, now occupied by this plaintiff with a connecting line of telegraph from a point at or near the station of said Railroad Company at the town of Gracey, in Christian County, Kentucky, and on and along said right of way and structures of said Railroad Company in a general southerly direction in Christian County, Kentucky, to a point where the right of way of said Railroad Company crosses the State line between the States of Kentucky and Tennessee on the southern boundary of Christian County, near the station of said Railroad Company at Kennedy, Kentucky. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Clarksville & Princeton Branch of said Railroad, with all spurs and branches thereof, now occupied by the Telegraph Company, and contains approximately 23 miles of pole line.

8. 7. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff with a connecting line of telegraph from a point at or near the station of said Railroad Company in the town of Lebanon, Marion County, Kentucky, and on and along the right of way and structures of said Railroad Company in a general southwestwardly direction in and through the Counties of Marion, Taylor and Green, in the State of Kentucky, to a point at or near the station of said Railroad Company in Greensburg, Kentucky. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Greensburg Branch of said railroad, with all spurs and branches thereof, now occupied by the Telegraph Company, and contains approximately 30 miles of pole line.

8. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff with a connecting line of telegraph from a point at or near the station of the defendant Railroad Company in the town of Corbin, Whitley County, Kentucky, thence in a general southeastwardly direction in and through the Counties of Whitley, Knox and Bell, in the State of Kentucky, to a point where the right of way of said Railroad Company crosses

the State line between Kentucky and Virginia about three miles, more or less, southeast of the station of the defendant at Middlesboro, Kentucky. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Cumberland Valley Division of said Railroad Company, together with all spurs and branches thereof, now occupied by the Telegraph Company, and contains approximately 47 miles of pole line.

9. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company, now occupied by this plaintiff, with a connecting line of telegraph from a point at or near the station of the defendant Railroad Company in the town of Wasieto, in the County of Bell, State of Kentucky, and on and along said right of way and structures of said Railroad Company in a general southwestwardly direction in said County of Bell, State of Kentucky, to a point at or near the station of said Railroad Company in Chenoa, in said County of Bell, State of Kentucky. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Chenoa Branch, together with all spurs and branches thereof, now occupied by the Telegraph Company, and contains approximately 12 miles of pole line.

10. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff, with a connecting line of telegraph from a point at or near the station of the defendant in the town of Elkton, County of Todd, State of Kentucky, thence in a southwardly direction through said County of Todd to a point in said right of way at or near the station of the defendant Railroad Company at the town of Guthrie, in said Todd County, Kentucky. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Elkton & Guthrie Railroad Branch, together with all spurs and branches thereof now occupied by the Telegraph Company, and contains approximately 10 miles of pole line.

11. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff with a connecting line of telegraph from a point in the right of way of said Railroad Company where said right of way crosses the Ohio River on the State line between the States of Indiana and Kentucky, and on and along said right of way and structures of said Railroad Company to a point at or near the station of said Railroad Company in the City of Henderson, County of Henderson, State of Kentucky, thence on and along said right of way and structures of said Railroad Company through said City of Henderson in a general southwardly direction in and through the Counties of Henderson, Webster, Hopkins, Christian and Todd, in the State of Kentucky, to a point where the right of way of said Railroad Company crosses the State line between the States of Kentucky and Tennessee on the southern boundary of Todd County, Kentucky, at a point near the station of said Railroad

Company at Sadlers, in the State of Tennessee. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Henderson Division, together with all spurs and branches thereof, now occupied by the Telegraph Company, and contains approximately 98 miles of pole line.

12. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant
- 10 Railroad Company now occupied by this plaintiff, with a connecting line of telegraph from a point at or near the station of said Railroad Company in the town of Madisonville, County of Hopkins, State of Kentucky, and on and along said right of way and structures of said Railroad Company in a general northwesterly direction in and through the Counties of Hopkins, Webster and Union, in the State of Kentucky, to a point at or near the station of said Railroad Company in the town of Morganfield, County of Union, State of Kentucky. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Madisonville & Providence Branch, and also the line of said Railroad Company commonly known as the Morganfield & Atlanta Branch, together with all spurs and branches thereof, now occupied by the Telegraph Company, and contains approximately 41 miles of pole line.

13. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff, with a connecting line of telegraph from a point in the right of way of said Railroad Company at or near the station of said Railroad Company in the City of Covington, State of Kentucky, thence on and along said right of way and structures through said City of Covington, and thence in a general southwardly direction in and through the Counties of Kenton, Pendleton, Harrison, Bourbon, Clark, Madison, Rockcastle, Laurel and Whitley, State of Kentucky, to a point where said right of way crosses the State line between Kentucky and Tennessee on the southern boundary of Whitley County, Kentucky, at or near the station of said Railroad Company at Lot, Kentucky. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Kentucky Division, Main Line, also the line of said Railroad Company commonly known as the Knoxville Division of said railroad, and also the line of said Railroad Company commonly known as the Pine Mountain Railroad Division of said railroad, together with all spurs and branches thereof, now occupied by the Telegraph Company, and contains approximately 206 miles of pole line.

14. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff, with a connecting line of telegraph from a point at or near the station of said Railroad Company in the City of Lexington, County of Fayette,
- 11 State of Kentucky, and on and along said right of way and structures of said Railroad Company in and through the City of

Lexington, County of Fayette, and County of Bourbon, State of Kentucky, to a point at or near the station of said Railroad Company at Paris, in the County of Bourbon, State of Kentucky. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Lexington & Paris Branch of said Railroad Company, together with all spurs and branches thereof, now occupied by the Telegraph Company, and contains approximately 17 miles of pole line.

15. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company, now occupied by this plaintiff, with a connecting line of telegraph from a point at or near the station of the defendant Railroad Company in the town of Paris, County of Bourbon, State of Kentucky, and on and along said right of way and structures of said Railroad Company in a general northeastwardly direction in and through the Counties of Bourbon, Nicholas, Fleming and Mason, to a point at or near the station of said Railroad Company in the town of Maysville, County of Mason, State of Kentucky. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Paris & Maysville Branch of said Railroad Company with all spurs and branches thereof, now occupied by the Telegraph Company, and contains approximately 49 miles of pole line.

16. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff, with a connecting line of telegraph from a point at or near the station of said Railroad Company at Rowland in Lincoln County, Kentucky, and on and along said right of way and structures of said Railroad Company in a general northeastwardly direction in and through the Counties of Lincoln, Garrard and Madison, to a point where said right of way intersects the right of way of the Kentucky Division of said Louisville & Nashville Railroad Company at or near the station of Fort Estill Junction in Madison County, Kentucky. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Richmond & Rowland Branch of said Railroad Company, together with all spurs and branches thereof, now occupied by the Telegraph Company, and contains approximately 37 miles of pole line.

17. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff, with a connecting line of telegraph from a point at or near the station of the defendant Railroad Company at Halsey, in Whitley County, Kentucky, thence on and along the said right of way and structures in a general southwestwardly direction to a point where said right of way crosses the State line between Kentucky and Tennessee on the southern boundary of Whitley County, Kentucky, near the station of said defendant Railroad Company in Jellico, Tennessee. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company

commonly known as the Halsey Branch, together with all spurs and branches thereof, now occupied by the Telegraph Company, and contains approximately 8 miles of pole line.

18. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff, with a connecting line of telegraph from a point in the right of way in that portion of the said Railroad Company commonly known as the Pine Mountain Railroad near the town of Lot in Whitley County, Kentucky, thence on and along said right of way and structures of said Railroad Company in a general southwestwardly direction in Whitley County, Kentucky, to a point where said right of way crosses the State line between Kentucky and Tennessee at or near the station of the defendant at Jellico, Tennessee. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Jellico Branch, together with all spurs and branches thereon now occupied by the Telegraph Company, and contains approximately 3 miles of pole line.

19. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff, with a connecting line of telegraph from a point commencing at or near the station of said Railroad Company at Lebanon Junction in Bullitt County, Kentucky, and on and along said right of way and structures of said Railroad Company in a general southeastwardly direction in and through the Counties of Bullitt, Nelson, Larue, Marion, Boyle, Lincoln and Rockcastle, State of Kentucky, to a point in the right of way of the Main Line of the Kentucky Division of said Railroad Company at or near the station of Sinks in Rockcastle County, Kentucky.

This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Lebanon Branch, together with all spurs and branches thereof now occupied by the Telegraph Company, and contains approximately 107 miles of pole line.

20. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff, with a connecting line of telegraph from a point at or near the station of said Railroad Company at Lexington Junction, in the County of Oldham, State of Kentucky, and on and along said right of way and structures of said Railroad Company in a general southeastwardly direction in and through the Counties of Oldham, Henry, Shelby, Franklin, Woodford, Scott and Fayette, in the State of Kentucky, to a point at or near the station of said Railroad Company in the City of Lexington, County of Fayette, State of Kentucky. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Lexington Branch, together with all spurs and branches thereof, now occupied by the Telegraph Company, and contains approximately 65 miles of pole line.

21. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff, with a connecting line of telegraph from a point at or near the station of said Railroad Company in the City of Shelbyville, Shelby County, Kentucky, and on and along said right of way and structures of said Railroad Company in a general northeastwardly direction in said Shelby County, Kentucky, to a point at or near the station of said Railroad Company at Christianburg, in said County of Shelby, State of Kentucky. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Shelbyville Cut-Off, together with all spurs and branches thereof now occupied by the Telegraph Company, and contains approximately $8\frac{1}{2}$ miles of pole line.

22. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff, with a connecting line of telegraph from a point at or near the station of said Railroad Company at Memphis Junction in Warren County, Kentucky, and on and along said right of way and structures of said Railroad Company in a general southwestwardly direction in and through the Counties of Warren, Simpson, Logan and Todd, State of Kentucky, to a point at or near where the right of way of said Railroad Company crosses the State line between Kentucky and Tennessee on the southern boundary of Todd County, Kentucky, near the station of said Railroad Company at Guthrie in Todd County, Kentucky. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Memphis Line, together with all spurs and branches thereon now occupied by the Telegraph Company, and contains approximately 46 miles of pole line.

23. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff, with a connecting line of telegraph from a point at or near the station of said Railroad Company in the City of Owensboro, Daviess County, Kentucky, and on — along said right of way and structures of said Railroad Company in a general southwardly direction in and through the Counties of Daviess, McLean, Muhlenburg and Logan, State of Kentucky, to a point at or near the station of said Railroad Company at Adairville, in Logan County, Kentucky. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Owensboro & Nashville Railway, together with all spurs and branches thereof now occupied by the Telegraph Company, and contains approximately 84 miles of pole line.

24. Also that portion of the right of way and structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff, with a connecting line of telegraph from a point at or near the station of the said Railroad Company at Penrod in the County of Muhlenburg, State of Ken-

tucky, and on and along said right of way and structures of said Railroad Company in a general northeastwardly direction in Muhlenburg County, Kentucky, to a point at or near the station of said Railroad Company at Mud River, Muhlenburg County, Kentucky. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Mud River Branch, together with all spurs and branches thereof now occupied by the Telegraph Company, and contains approximately 4 miles of pole line.

15 25. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff, with a connecting line of telegraph from a point at or near the station of said Railroad Company at Anchorage, in Jefferson County, Kentucky, and on and along said right of way and structures of said Railroad Company in a general eastwardly direction in and through the County of Jefferson and County of Shelby, to a point at or near the station of said Railroad Company in Shelbyville in Shelby County, Kentucky. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Shelby Branch, together with all spurs and branches thereof now occupied by the Telegraph Company, and contains approximately 19 miles of pole line.

26. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff, with a connecting line of telegraph from a point at or near the junction of the Lexington Division of said railroad with the old Kentucky Highlands Railway, about one mile east of Frankfort, County of Franklin, State of Kentucky, and on and along said right of way and structures of said Railroad Company in a general southeastwardly direction in and through the Counties of Franklin, Woodford, Jessamine, Madison, Estill and Lee, to a point where said right of way joins the right of way of the Lexington & Eastern Division of said Railroad Company in Lee County, Kentucky, at or near the station of said Railroad Company at Beattyville Junction in Lee County, Kentucky. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Louisville & Atlantic Division of said Railroad Company, together with all spurs and branches thereof, now occupied by the Telegraph Company, and contains approximately 101 miles of pole line.

27. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff, with a connecting line of telegraph from a point at or near the station of said defendant Railroad Company at Elwood in Bell County, Kentucky, thence in and along said right of way and structures of said Railroad Company in a general southeastwardly direction to a point at or near the station of said Railroad Company at Stony Fork Junction in Bell

County, Kentucky. This paragraph is intended to designate
16 the line of the Louisville & Nashville Railroad Company
commonly known as the Stony Fork Branch, together with
all spurs and branches thereof now occupied by said Railroad Com-
pany, and contains approximately 9 miles of pole line.

28. Also that portion of the right of way and structures, including
bridges, tunnels, trestles and viaducts of the defendant Railroad
Company now occupied by this plaintiff, with a connecting line of
telegraph from a point in the right of way of said defendant Railroad
Company at or near the station of Savoy in the County of Whitley,
and extending thence in a general eastwardly direction along the
right of way and structures of said Railroad Company in and through
the County of Whitley to a point at or near the station of said Rail-
road Company at Gatliff, Whitley County, Kentucky. This para-
graph is intended to designate the line of the Louisville & Nashville
Railroad Company commonly known as the Pine Mountain Rail-
road Branch, together with all spurs and branches thereof now
occupied by the Telegraph Company, and contains approximately
17 miles of pole line.

29. Also that portion of the right of way and all structures, in-
cluding bridges, tunnels, trestles and viaducts of the defendant Rail-
road Company now occupied by this plaintiff, with a connecting line
of telegraph from a point at or near the station of said defendant
Railroad Company, in the town of Madisonville, County of Hopkins,
State of Kentucky, thence along and through said town of Madison-
ville and also said right of way and structures of said Railroad
Company in a general northeastwardly direction in and through the
Counties of Hopkins, Muhlenburg and Ohio, in the State of Ken-
tucky, to a point at or near the station of the defendant Railroad
Company at Ellmitch, in Ohio County, Kentucky. This paragraph
is intended to designate the line of the Louisville & Nashville Rail-
road Company commonly known as the Madisonville, Hartford
& Eastern Division of said railroad, together with all spurs and
branches thereof now occupied by the Telegraph Company, and con-
tains approximately 55 miles of pole line.

30. Also that portion of the right of way and structures, in-
cluding bridges, tunnels, trestles and viaducts of the defendant Rail-
road Company now occupied by this plaintiff, with a connecting line
of telegraph from a point in the right of way of said defendant Rail-
road Company at or near the station of Avila in Bell County, Ken-
tucky, thence on and along the right of way and structures
17 of said Railroad Company in a general northeastwardly direc-
tion in and through the Counties of Bell and Harlan, to a
point at or near the station of the defendant Railroad Company at
Bremen in Harlan County, Kentucky. This paragraph is intended
to designate the line of the Louisville & Nashville Railroad Company
commonly known as the Wasioto & Black Mountain Railroad Divi-
sion of said Railroad Company, together with all spurs and branches
thereof now occupied by the Telegraph Company, and contains ap-
proximately 65 miles of pole line.

31. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff, with a connecting line of telegraph from a point in the right of way of said Railroad Company at or near the station of Saxton in Whitley County, Kentucky, thence on and along said right of way and structures of said Railroad Company in a general southeastwardly direction in Whitley County, Kentucky, to a point where said right of way crosses the State line between Kentucky and Tennessee on the southern boundary of Whitley County, Kentucky, at or near the town of Jellico, Tennessee. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company and commonly known as the Saxton-Jellico Division of said Railroad Company, together with all spurs and branches thereof now occupied by the Telegraph Company, and contains 3 miles of pole line.

32. Also that portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by the plaintiff, with a connecting line of telegraph from a point in the right of way of said defendant Railroad Company, at or near the intersection of New Main Street and Melwood Avenue in the City of Louisville, State of Kentucky, on said right of way, thence along said right of way in a general southwardly direction in and through the City of Louisville and County of Jefferson, State of Kentucky, to a point in South Louisville, Jefferson County, Kentucky, at or near the point of junction of said right of way with the right of way of the Main Stem of said Louisville & Nashville Railroad Company. This paragraph is intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Louisville Transfer Track, together with all spurs and branches thereof now occupied by the Telegraph Company, and contains approximately 4 miles of pole line.

18 33. That portion of the right of way and all structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff, with a connecting line of telegraph from a point in the right of way of said railroad at or near the station of the Nashville, Chattanooga & St. Louis Railway in the City of Paducah, County of McCracken and State of Kentucky, thence on and along said right of way and structures through said City of Paducah, thence in a general southwardly direction in and through the Counties of McCracken, Marshall and Callaway, to a point where said right of way crosses the State line between Kentucky and Tennessee on the southern boundary of Callaway County, Kentucky, at or near the station of said railway at Hazel, in Callaway County. The defendant, the Nashville, Chattanooga & St. Louis Railway Company, is operating the above described line of railway under a lease from its co-defendant, the Louisville & Nashville Railroad Company, and is made a party defendant hereto so that its leasehold interest in said property may be embraced in the judgment herein and the amount due to it on account of such leasehold interest adjudged to it.

Your petitioner does now occupy, and desires to continue to occupy on and after the 17th day of August, 1912, the right of way of the said Railroad Company in the State of Kentucky, as heretofore described, and to maintain and operate its lines of telegraph along and upon said right of way from and between all of said points above mentioned and indicated, and at said points to continue communication with lines of telegraph owned and operated by your petitioner to and at other points, and at all other places with which it connects in Kentucky and other States and countries, and does desire the right to enter in, upon and over said right of way of said Railroad Company for the purpose of repairing, rebuilding and reconstructing its said line of telegraph, all of said lines of telegraph of your petitioner to be and continue as now located, maintained and operated upon and along all the aforesaid rights of way of the said Railroad Company, as the same is laid out and surveyed in and through all the several counties of the State of Kentucky aforesaid, except as to such changes in location on said rights of way as the necessities of the Telegraph Company or the Railroad Company may, from time to time, require. All of said lines of telegraph are single lines except between Highland Park, Jefferson County, Kentucky, and Colesburg,

Hardin County, Kentucky, a distance of 30 miles; Tunnel Hill, Hardin County, Kentucky, and the north end of the defendant's yards at Bowling Green, Warren County, Kentucky, a distance of 74.50 miles, and the south end of defendant's yards at Bowling Green, Warren County, Kentucky, and Memphis Junction, Warren County Kentucky, a distance of 4 miles—a total distance of 108.50 miles which are double lines of telegraph.

And your petitioner further says that the only land occupied by the poles of your petitioner on and along said right of way does not exceed a circular piece of land eighteen (18) inches in diameter for each pole now existing or hereafter to be erected, six (6) feet deep, in which the poles supporting cross-arms, wires and appurtenances of said line of telegraph are now placed and at present in use by your petitioner under agreement with the defendant Railroad Company; that in any substitution, renewal or reconstruction of said telegraph line no more land along the right of way of said defendant Railroad Company will be used than that now occupied by the poles of your petitioner. The use made of said land by your petitioner is a public use and is authorized under the statutes of the State of Kentucky, and the taking of said land by this proceeding is necessary to such use and the public use to which it is and will be applied, and is and will be used, is of actual necessity and is a more necessary public use than that to which it is appropriated by the Railroad Company, and will not interfere with any public use to which such property is subjected or devoted.

Your petitioner does not seek to condemn or seek to occupy the land under its line of wires as described in the petition herein, but seeks to condemn and occupy only so much of the land on defendant's right of way as is occupied by its poles; that your petitioner expressly agrees and consents that the defendant may take from that

part of the right of way over which its wires may be strung, and on which its poles are set, all the dirt, gravel, sand, stone, water and other material of every kind and character that it may need from time to time; and in the event said right of way is cut down, or the grade thereof changed in any manner, your petitioner agrees to reset its poles and to reset its wires at its own expense upon due and reasonable notice in writing to that effect, so as to make them conform to such new grade; and your petitioner further states that its poles are not now set, and will not be set, so as to interfere with any ditch, drain or culvert or other work or structures of the defendant.

Your petitioner further avers that its said lines of telegraph have been owned, maintained and operated along and over the right of way of said lines of railroad of the defendant for many years prior hereto, and at the present time said lines are so maintained and operated as not to interfere with the ordinary use and operation of said railroad and the ordinary travel thereon, and that said lines of telegraph will continue to be so maintained and operated along the right of way of said lines of railroad of the defendant as not to interfere with the operation of the trains of said defendant, or with any proper or legitimate use of said right of way by the defendant, and will be so operated and maintained as not to be dangerous to persons or property. Your petitioner avers that said right of way, and no portion thereof, is now used or occupied by any other telegraph lines, and that no other telegraph line other than the lines of this petitioner have been constructed on said right of way, or any part thereof.

Your petitioner states that the line of telegraph owned, maintained and operated by your petitioner and now located along and upon said right of way of the defendant, Railroad Company, as aforesaid, is constructed of the best materials and upon the most approved plan known or in use in this country, and that in the reconstruction or renewal of said line of telegraph your petitioner proposes to use the best materials and the most approved plan of construction known or in use in this country at the time said renewal or reconstruction occurs; that the poles now in use on its line of telegraph are of wood, are not less than thirty (30) feet long, and not less than one (1) foot in diameter at the base, and that said poles, as erected, are firmly fixed in the ground at a depth of not less than five (5) feet in such a manner as to hold them firmly in position, and that in the renewal or reconstruction of said line, when same may become necessary, poles of the same material and of the same size, and placed at the same depth, and in an equally secure manner, are proposed to be used; and that on and upon such poles are fixed or attached suitable wooden arms with glass insulators, upon and along which are strung, attached or suspended, at or near the upper end, metallic wires of suitable material and of sufficient number to enable your petitioner to properly transmit its messages, news and intelligence; and that in any renewal or rebuilding of said line of telegraph, arms,

21 insulators and metallic wire of a like character, and of the best material obtainable at the time, will be installed in the most approved, workmanlike manner.

Your petitioner says that where the right of way of the defendant is of the customary and standard width, viz., one hundred feet, its poles are located about ten feet from the outer edge thereof, but your petitioner finds that said right of way varies in width, and that, therefore, it has been unable to locate its poles at a uniform distance from either the outer edge or the center line of said right of way, but has located said poles at such points, and in such manner, that said poles and said telegraph lines have not and will not interfere with the ordinary use or the ordinary travel and traffic on said railroad or damage, injure or obstruct said right of way or any use of it by said defendant for railroad purposes. That said poles were so placed and located with the approval of said Railroad Company, and that any renewals or substitutions thereof will be placed in a like manner, at the same points, or at such other points on said right of way adjacent thereto as the necessities of the defendant may require.

Said poles are of such heights above the ground to permit the wires to be suspended so far above the tracks or works of said Railroad Company or any cars that may be run thereon, as to prevent any interference therewith or damage thereto, or any interference with or injury to any of the employes of said railroad, or of other persons, and that all of said construction, including the placing and location of said poles and fixtures, was with the consent and approval of said Railroad Company, and that in any renewal or substitutions of said poles which may become necessary, the poles used will be of a like character and located in a similar manner. The cross-arms affixed or attached to said poles are not less than eight (8) feet long and extend an equal distance on either side of the pole to which it is attached, and each cross-arm carries a number of wires and was so placed and affixed with the approval and consent of the defendant Railroad Company; that such other cross-arms and wires as the business of the Telegraph Company may hereafter require to be affixed or attached to said poles will be of a like character and affixed or attached in a similar manner. And your petitioner says that the posts, arms, insulators and other fixtures of its said telegraph lines erected or to be erected and maintained, will be erected and maintained in the usual manner of constructing, operating and maintaining telegraph lines on or along or upon the right of way and structures of railroads, and in such manner as not to interfere with the ordinary use or the ordinary travel and traffic on the defendant railroad, and in such manner as not to interfere with any other telegraph line already constructed on the right of way of said railroad, and that said telegraph lines will in no way damage, injure or obstruct the property, or any use of it by said defendant Railroad Company, or damage in value the said right of way for said

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railroad purposes or any other legitimate purposes for which it might, under the law, be used by said defendant Railroad Company.

And your petitioner further says that in the event defendant shall at any time desire to change the location of its tracks, or to construct new tracks, or to construct new depots or other buildings, or to change the location of same where any of your petitioner's poles or wires are located upon defendant's right of way, your petitioner hereby consents and agrees to remove its said poles and wires at said points to any other part of the defendant's right of way adjacent thereto designated by the defendant upon due and reasonable notice in writing to that effect, and at the expense of your petitioner.

Your petitioner consents and agrees to assume all the risks to its poles, wires, insulators, cross-arms, etc., and will hold the defendant harmless from any damage to any of your petitioner's property occasioned by the burning of grass or undergrowth upon said railroad right of way.

Your petitioner further expressly agrees and consents that it has no right to fence any of said right of way nor in any manner to exclude the defendant therefrom.

Your petitioner states that the compensation to be paid to the defendant Railroad Company for the property sought to be condemned herein for the purposes herein mentioned could not be agreed upon by the said Railroad Company and your petitioner; that your petitioner, on November 30, 1911, addressed a communication to the defendant, the Louisville & Nashville Railroad Company, which was delivered to the President of said Company on December 1, 1911; that in said communication your petitioner set out that it thereby proposed to agree with the defendant, the Louisville & Nashville Railroad Company, upon the compensation to be paid for the property sought to be condemned herein, a certain sum being set forth in said communication as such proposed compensation, but that the said defendant, the Louisville & Nashville Railroad Company, failed and refused to agree upon said compensation or to propose any other.

23 Your petitioner further avers that it stands ready, and is able, willing and hereby offers to pay to the defendant Railroad Company such just and reasonable compensation as may be decreed by this court under this petition for the use of the right of way of the defendant company as herein described on which to construct, maintain and continue to operate your petitioners' telegraph lines.

Wherefore, the premises considered, your petitioner prays that an order may be entered, condemning the use of so much of said right of way of said defendant Railroad Company as is now occupied by your petitioner with its lines of poles and wires as herein described, and so much of said right of way as may be necessary and proper for the construction, maintenance and operation of your petitioner's lines of telegraph between the several points in the several counties named in this petition and along the said right of way

in this petition described, together with the right and easement to enter on and over the right of way of said Railroad Company for the purpose of repairing, rebuilding or reconstructing said telegraph lines along said right of way, in the manner, for the purpose and upon the conditions and stipulations in said petition set forth, and for such other proper and general relief as it may appear upon the final hearing your petitioner is entitled to.

ALEX. P. HUMPHREY,
RICHARDS & HARRIS,
Attorneys for Petitioner.

24 *Order Filing Demurrers to Petition.*

Entered October 14, 1912.

This day came the defendant, the Louisville & Nashville Railroad Company, by H. L. Stone, its attorney, and filed a special and general demurrer to the plaintiff's petition herein. Came also the defendant, Nashville, Chattanooga & St. Louis Railway Company, by Wheeler & Hughes, its attorneys, and filed a special demurrer to the plaintiff's petition herein. It is ordered that said demurrers be set for hearing October 24, 1912.

Special Demurrer of the Louisville & Nashville Railroad Company.

Filed October 14, 1912.

The defendant, Louisville & Nashville Railroad Company, demurs specially to the petition of the plaintiff, Western Union Telegraph Company, because it shows:

That the court has no jurisdiction of the defendant, or of the subject of the action.

HELM BRUCE,
BENJAMIN D. WARFIELD,
CHARLES H. MOORMAN,
HENRY L. STONE,

*Attorneys for Defendant, Louisville &
Nashville Railroad Company.*

25 *General Demurrer of the Louisville & Nashville Railroad Company.*

Filed October 14, 1912.

The defendant, Louisville & Nashville Railroad Company, without waiving its special demurrer, demurs generally to the plaintiff's petition, because it does not state facts sufficient to constitute or support a cause of action against it.

HELM BRUCE,
BENJAMIN D. WARFIELD,
CHARLES H. MOORMAN,
HENRY L. STONE,

*Attorneys for Defendant, Louisville &
Nashville Railroad Company.*

Order on Defendant's Demurrers.

Entered October 24, 1912.

This cause coming on to be heard upon the several demurrers of the Louisville & Nashville Railroad Company, and upon that of the Nashville, Chattanooga & St. Louis Railway, was argued by counsel. Pending the same the plaintiff, with leave of the court, filed an amended petition—all the said demurrers to apply to the petition as now amended. And the court being now advised, it is considered and adjudged as follows, viz.:

First, That the special demurrer of the Nashville, Chattanooga & St. Louis Railway should be, and it is sustained, to which the plaintiff excepts, and the court not appearing to have jurisdiction of the action, so far as said defendant is concerned, it is considered and adjudged as to the defendant, the Nashville, Chattanooga & St. Louis Railway, that this action be, and it is, dismissed for want of jurisdiction, to which the plaintiff excepts.

26 Second, That the special demurrer of the defendant, the Louisville & Nashville Railroad Company, to the plaintiff's petition should be, and it is, denied and overruled, to which said defendant excepts; and,

Third, That the general demurrer of the defendant, the Louisville & Nashville Railroad Company, to the plaintiff's petition, should be, and it is also, denied and overruled, to which said defendant excepts.

Leave is given the said defendant to answer or otherwise proceed as it may be advised within ten days.

Order Filing Answer of Defendant, Louisville & Nashville Railroad Company.

Entered November 2, 1912.

This day came the defendant, the Louisville & Nashville Railroad Company, by H. L. Stone, its attorney, and filed its answer herein.

Answer of Louisville & Nashville Railroad Company.

Filed November 2, 1912.

I.

The defendant, Louisville & Nashville Railroad Company, for separate answer herein, and without waiving its demurrers or its objection to the jurisdiction of this court in this proceeding
27 over the subject-matter thereof, or over this defendant, but still insisting thereon, states it is true the plaintiff, Western Union Telegraph Company, is a corporation organized and existing

under the laws of the State of New York, and a citizen of that State, and is a corporation chartered and duly organized and existing under the laws of that State, but defendant denies that the plaintiff under its charter or the laws of New York has power to own, construct, operate or maintain lines of electric telegraph or to acquire by purchase or otherwise property for the extension, construction, operation and maintenance of lines of electric telegraph in all the States of the United States, or in the State of Kentucky, except to the City of Louisville through Covington, Georgetown and Frankfort, including a branch circuit to Lexington, in that State, or to acquire by purchase or otherwise, without the consent of the defendant, a right of way over the rights of way owned by said defendant on or over which its lines of railroad are located and operated in the State of Kentucky.

The defendant states it is true the plaintiff at the institution of this suit had occupied the right of way and structures located on defendant's said rights of way in the State of Kentucky, with its lines of telegraph, consisting of poles, wires, fixtures, and appurtenances under a contract with defendant which expired on August 17, 1912, in pursuance of a notice given by plaintiff to defendant in writing on August 17, 1911, in pursuance of the contract aforesaid, but defendant denies that the plaintiff has any lawful power or authority to continue or to acquire by condemnation proceedings, or otherwise, without the consent of this defendant, such right of way and structures or any part thereof, or to maintain or operate its said line of telegraph where now placed or located, or hereafter constructed or subject to such changes and location of such right of way as the necessities of the plaintiff or the defendant may require.

The defendant denies that by reason of plaintiff's acceptance of the Act of Congress of July 24, 1866, it has the right to construct, maintain or operate lines of telegraph over or along the military or post-roads of the United States or the right of way of the defendant, the use of which plaintiff seeks to condemn for the uses and under the restrictions named in its petition, or that the plaintiff, by virtue of said Act of Congress and the Act of Congress of June 8, 1872, or either of them, has the right to construct, maintain or operate its telegraph lines along defendant's right of way without its consent.

28 The defendant denies that in order to properly fulfill its obligation to the Government of the United States, or to properly handle its business between the various points in the counties in Kentucky named in its petition, or to properly handle its business between points in that State, Tennessee, Missouri or other States, and the larger cities of the United States; or the Republic of Mexico or the Central or South American Republics, it has been or will continue to be necessary for the plaintiff to maintain or operate its telegraph lines along the right of way or structures of the defendant in the State of Kentucky, or that it is to the interest of the Government of the United States or of the public generally, or of the plaintiff, that the plaintiff shall continue uninterruptedly in

the full or peaceable enjoyment of the defendant's railroad right of way, or that the same is the most direct, safe or practical post-road or highway for the location of the telegraph lines or connecting wires mentioned in its petition.

The defendant denies that it is the owner of all the property described in plaintiff's petition, or which is sought to be condemned by this proceeding for the use of plaintiff for the purpose of maintaining and operating its line of telegraph as now constructed thereon, or for the purpose of repairing, reconstructing or rebuilding said telegraph line as the necessities of the plaintiff may require or of owning, maintaining or operating telegraph lines thereon. The parts of the property sought to be condemned by plaintiff not owned by this defendant will be hereinafter particularly referred to and described.

The defendant denies that plaintiff has any lawful right or authority to continue to occupy the right of way or structures occupied by it at the institution of this action with its poles, wires and lines of telegraph, or to maintain or operate its said lines of telegraph where then or now placed or located, subject to such change of location on such right of way as the necessities of the plaintiff or defendant may require, or otherwise, together with the right of easement to enter on or over the right of way of the defendant for the purpose of repairing, rebuilding or reconstructing said telegraph lines, or either of them, along said right of way, or any part thereof, described in plaintiff's petition.

II.

The defendant states that the property consisting of the right of way, structures, bridges, tunnels, trestles and viaducts, constituting the Elkton & Guthrie Railroad situated in Todd County, State of Kentucky, described in the tenth paragraph of plaintiff's petition, was not at the institution of this suit, at any time since, and is not now owned by the defendant, but this defendant simply operates the same as the lessee of the Elkton & Guthrie Railroad Company, a corporation organized and existing under the laws of the State of Kentucky, which was at the institution of this suit, has been since, and is now, the owner and lessor thereof.

III.

The defendant states that the property, right of way, structures, bridges, tunnels, trestles and viaducts constituting the Morganfield & Atlanta Railroad, 25.35 miles in length, described in the twelfth paragraph of plaintiff's petition as the Morganfield & Atlanta Branch, was not at the institution of this suit, has not been since, and is not now, owned by this defendant which simply operates the same for the account, of the owner, the Morganfield & Atlanta Railroad Company, a corporation organized and existing under the laws of the State of Kentucky.

IV.

The defendant states that the description of the property, right of way, structures, bridges, tunnels, trestles and viaducts set forth in the thirteenth paragraph of plaintiff's petition includes a piece of railroad known as the Pine Mountain Railroad Division of the defendant which is not owned by the defendant, but the defendant simply operates the same for the account of the owner, the Pine Mountain Railroad Company, a corporation organized and existing under the laws of the State of Kentucky.

V.

The defendant states that the property, right of way, structures, bridges, tunnels, trestles and viaducts described in the seventeenth and eighteenth paragraphs, respectively, of the plaintiff's petition are misdescribed. The branch known as the Halsey Branch is composed of two lines, one beginning at Keswick, on the Knoxville Division and extending to Halsey, a distance of about five (5) miles, and the other beginning at a point on the Knoxville Division near Lot and extending to a point on the Jellico Branch north of Jellico. The eighteenth paragraph describes it as the line
30 known as the Pine Mountain Railroad and erroneously states that it is commonly known as the Jellico Branch, which begins at Saxton and extends to Jellico, Tennessee, and is properly described in the thirty-first paragraph of the plaintiff's petition, although in the latter paragraph said line is referred to as the Saxton-Jellico Division, when it should be the Jellico Division.

VI.

The defendant states the property described in the twenty-fourth paragraph of plaintiff's petition was originally the Mud River Branch of the Owensboro & Nashville Division, the rails of which long prior to the institution of this suit had all been taken up, with nothing but the right of way remaining.

VII.

The defendant states the description of the property set forth in the twenty-sixth paragraph of plaintiff's petition includes 15.98 miles of the Kentucky Highlands Railroad, which the defendant does not own, but simply operates for the account of the owner, the Kentucky Highlands Railroad Company, a corporation organized and existing under the laws of the State of Kentucky.

VIII

The defendant states that the property described in the twenty-eighth paragraph of plaintiff's petition, consisting of right of way, structures, bridges, tunnels, trestles and viaducts, and called by the

plaintiff the Pine Mountain railroad Branch, is the Pine Mountain Railroad twenty-one miles in length instead of seventeen, owned by the Pine Mountain Railroad Company, a corporation organized and existing under the laws of the State of Kentucky. The defendant simply operates said railroad for the account of the latter company.

IX.

The defendant states the property described in the thirtieth paragraph of the plaintiff's petition, consisting of the right of way, structures, bridges, tunnels, trestles and viaducts of the Wasioto & Black Mountain Railroad, 68.12 miles in length instead of 65, terminating at Benham instead of Bremen, is not owned by the defendant which simply operates the same for the account of the owner, the Wasioto & Black Mountain Railroad Company, a corporation organized and existing under the laws of the State of Kentucky.

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X.

The defendant denies that the only land occupied by the poles of the plaintiff on or along defendant's right of way does not exceed a circular piece of land 18 inches in diameter for each pole now existing or hereafter to be erected, 6 feet deep in which the poles supporting crossarms, wires and appurtenances of said line of telegraph are now placed which were in use by the plaintiff at the institution of this suit under the agreement with defendant, or that in any substitution, renewal or reconstruction of said telegraph lines no more land along the right of way of defendant will be used than such as is occupied by the poles of the plaintiff.

The defendant denies that the use made by the plaintiff of the land or right of way of the defendant at the institution of this suit is or was authorized under the statutes of the State of Kentucky, or that the taking of said land or right of way by this proceeding is necessary to such use or the public use to which it is or will be applied, or is or will be used, or that it is of actual necessity, or is a more necessary public use than that to which it is appropriated by the defendant, or that it will not interfere with any public use to which such property is subjected or devoted.

XI.

The defendant denies the power or authority on the part of the plaintiff alone to agree or consent, as it proposes in its petition, without the concurrence of the defendant, that defendant may take from that part of the right of way over which plaintiff's wires may be strung or on which its poles are set, should the same be condemned for that purpose herein, all the dirt, gravel, sand, stone, water or other material of every kind or character that defendant may need from time to time, in the event said right of way is cut down or the grade thereof changed in any manner, that plaintiff shall reset

its poles or its wires at its own expense upon due or reasonable notice in writing to that effect so as to make them conform to such new grade, or the power or authority of the court herein to enter any order or judgment which would bind the plaintiff or make effectual the proposed contract between the plaintiff and the defendant in that respect or concerning said proposition set forth in plaintiff's petition, and defendant denies the power or authority of the plaintiff or the court herein to make any such condition or conditions in this proceeding which would in any wise bind the defendant or require the defendant to accept in such conditions any damages or the value of its land or right of way which the law entitles it to as just compensation in money for the taking, injury or destruction of its property for the purposes set forth in the petition, as provided by Section 242 of the Constitution of the State of Kentucky.

The defendant denies that the plaintiff's lines of telegraph on the defendant's right of way are so maintained or operated as not to interfere with the ordinary use or the operation of defendant's railroad, or the ordinary travel thereon.

Defendant states it has no knowledge or information sufficient to form a belief that said lines of telegraph will continue to be so maintained or operated along the right of way of its lines of railroad as not to interfere with the operation of the trains of defendant, or with any proper or legitimate use of defendant's right of way, or will be so operated and maintained as will not be dangerous to persons or property, but denies that the same will or can be so maintained on defendant's right of way as not to obstruct or interfere with the ordinary use or operation of defendant's railroad and the ordinary travel thereon, or the proper or legitimate use of defendant's right of way, or so as not to be dangerous to persons or property.

Defendant denies that its said right of way or no portion thereof is now used or occupied by any other telegraph lines, or that no telegraph line other than the lines of the plaintiff have been constructed on said right of way or any part thereof.

The defendant denies that the line of telegraph owned, maintained and operated by plaintiff at the institution of this suit located along and upon defendant's right of way is constructed of the best materials, or upon the most approved plan known or in use in this country, and the defendant denies the power or authority of the plaintiff to bind itself, or of the court to enter an order or judgment that will bind or obligate the plaintiff herein, without the consent of the defendant, to the proposal the plaintiff makes in its petition, should the property of the defendant be condemned for the purposes sought by plaintiff herein, to use the best materials or the most approved plan of construction known or in use in this country at the time such renewal or reconstruction occurs.

The defendant denies the poles now in use by plaintiff on its line of telegraph are not less than 30 feet long, or not less than one foot in diameter at the base, or that said poles as erected are firmly fixed in the ground at a depth of not less than 5 feet in such a manner as to hold them firmly in position.

The defendant denies the power or authority of the plaintiff to bind itself, or of the court by any judgment or order herein, to obligate the plaintiff, without the consent of the defendant, should the property of the defendant be condemned as sought herein, in the renewal or reconstruction of plaintiff's line when the same may become necessary to erect or use poles of the same material and of the same size, placed at the same depth or in an equally secure manner as those alleged by plaintiff to be now erected and used on defendant's right of way, or to affix or attach on or upon such poles suitable wooden arms with glass insulators, upon or along which shall be strung, attached or suspended at or near the upper end metallic wires of suitable material or of sufficient number to enable plaintiff to properly transmit its messages, news and intelligence, or that in any renewal or rebuilding of said line of telegraph the arms, insulators and metallic wire of a like character or of the best material obtainable at the time, shall be installed in the most approved or workmanlike manner.

The defendant denies that where its right of way is of the alleged customary or standard width, viz., 100 feet, plaintiff's poles are located about 10 feet from the outer edge thereof, or that on account of the varying width of defendant's right of way plaintiff has been unable to locate its poles at a uniform distance from either the outer edge or the center line of defendant's right of way, or that plaintiff has located its poles at such points or in such manner that said poles or said telegraph lines have not or will not interfere with the ordinary use or the ordinary travel or traffic on defendant's railroad, or damage, injure or obstruct said right of way or any use of it by defendant for railroad purposes, or that said poles were so placed or located with the approval of the defendant, or that any renewals or substitutions thereof will be placed by plaintiff in a like manner, or at the same points, or at such other points on said right of way adjacent thereto as the necessities of the defendant may require.

The defendant denies that plaintiff's poles are of such heights above the ground as to permit the wires to be suspended so far above the tracks or works of the defendant, or any cars that may be run thereon as to prevent any interference therewith or damage thereto, or interference with, or injury to any of the employees of the defendant or of other persons, or that all of said construction, including the placing and location of said poles and fixtures, was with the consent or approval of the defendant, or that in any renewals or substitutions of said poles which may become necessary the poles used will be of a like character or located in a similar manner.

The defendant denies that all the cross-arms affixed or attached to said poles are or were placed or affixed on the poles in the telegraph line located on defendant's right of way with the approval or consent of the defendant, and defendant has no knowledge or information sufficient to form a belief that such other cross-arms or wires as the business of the plaintiff may hereafter require to be affixed or attached to said poles, in the event the defendant's right of way shall be condemned as herein sought by plaintiff, will be of a

like character or affixed or attached in a similar manner, or that the posts, arms, insulators or other fixtures of plaintiff's telegraph lines to be erected or maintained will be erected or maintained in the usual manner of constructing, operating or maintaining telegraph lines on, or along, or upon the right of way and structures of railroads, and denies that they will or can be so erected or maintained as not to interfere with the ordinary use or ordinary travel or traffic on the defendant railroad, or in such manner as not to interfere with any other telegraph line already constructed on the right of way of said railroad, or that said telegraph lines will not in any way damage, injure or obstruct the property, or any use of it by the defendant, or not damage in value the same right of way for said railroad purposes or any other legitimate purposes for which it might under the law be used by the defendant.

The defendant denies the power or authority of the plaintiff to bind itself in this proceeding or without the consent of the defendant, and denies the power or authority of the court, by any order or judgment herein, to obligate the plaintiff, should the land sought to be condemned herein be taken for that purpose, as proposed in the plaintiff's petition, in the event the defendant shall at any time desire to change the location of its tracks or to construct new tracks or to construct new depots or other buildings, or to change the location of the same where any of plaintiff's poles or wires are located upon defendant's right of way, to remove its said poles or wires at said points to any other part of defendant's right of way adjacent thereto designated by defendant, upon due or reasonable notice in writing to that effect, or at the expense of the plaintiff, or to assume all or any of the risks to its poles, wires, insulators, cross-arms, etc., or to hold the defendant harmless from any damage to any of plaintiff's property occasioned by the burning of grass or undergrowth upon said railroad right of way, or to refrain from exercising the right to fence any of said right of way, or from in any manner excluding the defendant therefrom.

XII.

The defendant, for further answer herein, states that this action or proceeding was instituted and *in* being prosecuted by the plaintiff under and by virtue alone of the provisions of an Act of the General Assembly of the Commonwealth of Kentucky, entitled "An Act giving effect to so much of Section 199 of the Constitution of the Commonwealth of Kentucky as provides for the right to construct and maintain lines of telegraph within this State," approved March 19, 1898, which now forms and constitutes Section 4679-a, Kentucky Statutes (Carroll's Edition, 1909), divided into twelve subsections corresponding with the numbers of the sections of said original Act.

The defendant states the foregoing statute is the only one in the State of Kentucky which undertakes or purports to grant to a telegraph company, chartered or incorporated by the laws of this or any other State, the right to construct, maintain or operate telegraph lines on, along, or upon the right of way and structures of any rail-

road in this State, or in case any telegraph company is unable to agree with such railroad company for the exercise of the rights and privileges attempted to be thus conferred the said statute is the only one in this State which purports or undertakes to vest a telegraph company with the right of eminent domain or to authorize or empower a telegraph company to condemn in the mode therein prescribed, or otherwise, any portion of the land or right of way of a railroad company, or any use or easement or privilege therein for the construction, operation or maintenance of a telegraph line, and for the uses and purposes of an electric telegraph permanently, perpetually, or for any term or period.

The defendant states that the Act of March 19, 1898, violates the provisions of the Constitution of the State of Kentucky hereinafter referred to and set forth, and is, therefore, unenforceable, null and void.

By Section 2 of said Act, which is Subsection 12 of said Section 4679-a, all laws in conflict with said Act were thereby repealed.

The defendant states that said Act, although it undertook to do so, did not in fact confer upon the County Court of any County in the State of Kentucky any jurisdiction to hear or determine such a proceeding for the condemnation of the right of way and structures, or any part thereof, of any railroad company in this State for the right of way or uses and purposes of a telegraph company, nor did said Act confer upon any telegraph company, chartered or incorporated by the laws of this or any other State, the right of eminent domain, because the provisions of said Act are in violation of the Constitution of this State and the Constitution of the United States in the following particulars, among others, to-wit:

1. Section 242 of the State Constitution provides:

"Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction. The General Assembly shall not deprive any person of an appeal from any preliminary assessment of damages against any such corporation or individual made by Commissioners or otherwise; and upon appeal from such preliminary assessment, the amount of such damages shall, in all cases, be determined by a jury, according to the course of the common law."

But, notwithstanding said provision, Section 8 of said Act of March 19, 1898, provides as follows:

"That either party shall have the right to appeal from said judgment to the Court of Appeals, within thirty days after the rendition of said judgment, upon entering into bond with sureties, to be approved by the court or judge in vacation in the sum of two hundred dollars, conditioned to pay all costs that may be adjudged against it if said cause shall be affirmed. But an appeal by the defendant shall not operate as a supersedeas provided the telegraph company shall enter into bond with sureties to be approved by the court in double

the amount of the award payable to the defendant in case said cause shall be reversed, and upon the execution of such bond may construct its telegraph line upon the right of way as prayed for in its petition."

37 By this section of said Act, whereby an appeal by either party is limited to an appeal to the Court of Appeals within thirty days after the rendition of the judgment upon the verdict of the jury making the preliminary assessment of the damages for the property taken and occupied, the Railroad Company is deprived of the right of an appeal from the preliminary assessment of damages made by Commissioners or otherwise (that is to say, by such a jury), to the Circuit Court, and also deprived, upon appeal from such preliminary assessment, of having the amount of such damages determined by a jury according to the course of the common law.

2. Sec. 248 of the State Constitution, among other provisions, provides as follows:

"In civil and misdemeanor cases, in courts inferior to the Circuit Courts, a jury shall consist of six persons."

But by Sec. 4 of said Act of March 19, 1898, it is provided that the clerk of the county court, in the proceeding instituted by a telegraph company therein, shall issue a writ of fieri facias, commanding the sheriff to summon and have on the first day of said court to which the cause is returnable, a special venire of eighteen good and lawful men, citizens and qualified jurors of said county to serve as jurors in said cause. To which jurors either party may have as many challenges, and for the same causes, as in the trial of other civil causes in the Circuit Courts of this Commonwealth, and from said special venire and talesmen, if necessary, a jury of twelve shall be empaneled, who shall be sworn by the clerk or judge of said court, in the form therein set forth, to render a verdict in such cause, assessing for the defendant therein the actual cash value of so much of its land as may be shown by the proof will be actually taken and occupied by the petitioner, and such other incidental damages, if any, as shown by the proof will accrue to the remainder of the right of way for the purpose for which it is held by the defendant, by reason of the construction of petitioner's telegraph line in the manner set out in the petition.

3. Sec. 3 of the State Constitution provides that:

"All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services."

38 And Sec. 59 of the State Constitution provides that the General Assembly shall not pass local or special acts concerning any of the subjects therein set out; and by Subsec. 29 thereof it is

provided that in all other cases where a general law can be made applicable, no special law shall be enacted.

The defendant states that said Act of March 19, 1898, is a special act within the true intent and meaning of said constitutional provisions, and violates the same by undertaking to grant to telegraph companies the exclusive privilege of acquiring the private property of railroad and turnpike companies in their rights of way through the exercise of the right of eminent domain, whereas the private property of all other land owners is exempted from such condemnation proceedings in behalf of a telegraph company, and railroad and turnpike companies are arbitrarily selected to bear such burdens, and deprived of that equality which is the constitutional right under the Constitution of the United States of all private property owners in the State.

4. The measure of damages fixed by said Act of March 19, 1898, deprives railroad companies of that just compensation for property taken, injured, or destroyed for public use which is required to be paid before such taking, or paid or secured, at the election of the corporation or individual invested with the privilege of taking private property for public use, before such injury or destruction, as provided for in Sec. 242 of the State Constitution. The provisions of said Act limit the jury of twelve, in the oath required to be administered to them, in assessing the damages for the defendant, to "the actual cash value of so much of its land as may be shown by the proof will be actually taken and occupied by the petitioner, and such other incidental damages, if any, as shown by the proof will accrue to the remainder of the right of way for the purpose for which it is held by the defendant, by reason of the construction of petitioner's telegraph line in the manner set out in the petition." And said Act further confines the testimony which either party may offer to proof of "the cash market value of land that will be taken and occupied by the petitioner, and all actual damages that will accrue to the defendant in the diminution of the value of the remainder of its right of way for railroad purposes * * * by reason of the construction of the telegraph line upon such right of way in the manner set out in the petition, and in considering incidental damages to the defendant the jury may take into consideration any advantages that may accrue to the defendant as shown by the proof, by reason of the construction of such telegraph line." No damages are, by the provisions of said Act, required to be assessed for the value of the property of the Railroad Company "injured or destroyed" by the construction of such telegraph line, nor is the value of such property to the railroad company as a common carrier for telegraph or telephone purposes required to be assessed or paid.

5. Furthermore, Sec. 6 of said Act of March 19, 1898, expressly declares "the jury shall not be required to go upon or view such right of way," thus depriving the railway company of important and material evidence to which it is entitled in the assessment of the damages which it will sustain by reason of the taking, injury, or destruction of its private property for public use by a telegraph company; and such

deprivation results from a legislative declaration instead of a judicial ruling, in the exercise of the sound discretion, under all the facts and circumstances, of a court of justice wherein such proceeding shall be pending.

6. The defendant states that said Act of March 19, 1898, being an Act of the State of Kentucky, does, in its necessary operation, and would, if enforced in such a proceeding in a county court or this court, deprive the defendant herein of its property without due process of law, in violation of the provisions of Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, and is, therefore, null and void, and confers no jurisdiction whatever upon a county court or this court either of the subject-matter of said proceeding or of the defendant herein.

7. The defendant further states that said Act of March 19, 1898, being an Act of the State of Kentucky, in its necessary operation does, and if enforced in said proceeding in a county court or this court would deny to the defendant herein the equal protection of the laws, in violation of the provisions of Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, and is, therefore, null and void, and does not confer any jurisdiction upon a county court or this court of the subject-matter of such a proceeding or of the defendant herein.

8. The defendant states that it is, and has been since a date long prior to the institution of plaintiff's suit herein, authorized and empowered by an amendment to its legislative charter, in accordance with the laws of this State, to own, construct, control, operate and maintain telegraph and telephone lines on, over and along its railroad right of way, not only for the conduct of its own railroad
40 road business, but commercially as a common carrier of messages, news, intelligence and information for the public at large and the receipt and delivery thereof, for just and reasonable compensation or hire, in this State and other States, as provided by the laws thereof.

The defendant states the rights of way of its railroads in this State are so narrow (usually and on an average not exceeding 66 feet wide, some being of more and some of less width) they are now and in the future within a reasonably short time will be needed to the extent of their full width as well as their entire length for its own railroad, telegraph, telephone and signal lines, business and purposes, and there is now and will be then no room or space on, over or along the same for the construction, operation and maintenance of a line of poles and wires of the plaintiff's telegraph business and purposes, or the continued operation and maintenance of plaintiff's present telegraph line thereon, which, on and after August 17, 1912, materially and substantially obstructed, trammelled and interfered with the construction, operation and maintenance of the defendant's own railroad, telegraph, telephone, signal lines and the ordinary travel and traffic with safety and efficiency on its railroads, and that of its telegraph and telephone and signal lines when constructed on, over and along the right of way of its said railroads in this State.

The defendant states it is and has been for a great many years a common carrier by railroad engaged in interstate commerce, subject to the Act of Congress to regulate commerce, approved February 4, 1887, and the amendments thereto; and its system of railroads located in this State and outside of this State are also military and post-roads or post-routes, within the true intent and meaning of the Act of Congress approved June 15, 1866 (Section 5258, U. S. Compiled Statutes, 1901), and the Act of Congress approved June 8, 1872 (Sect. 3964, U. S. Compiled Statutes, 1901), which authorized and empowered every railroad operated by steam, as defendant's railroads were then, have been ever since, and are now, to carry freight, passengers, troops, government supplies, mails and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination, and which Acts were enacted under the powers vested in Congress to establish post-roads, and to regulate commerce among the several States, and were designed to remove trammels upon transportation between different States which had previously existed, and to prevent such trammels in future, and were intended, among other objects and purposes, to reach trammels interposed by or under the provisions of State enactments.

The defendant further states that under the Act of Congress entitled "An Act to aid the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes," approved July 24, 1866 (Sections 5263-5268, U. S. Compiled Statutes, 1901), the restrictions and obligations of which Act the defendant has heretofore duly accepted in writing and filed the same with the Postmaster General, in accordance with the provisions thereof; and under its charter, as amended as aforesaid, the defendant has the right, and it is duly authorized and empowered to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, and, with their consent, along any of the military or post-roads or post-routes of the United States (including its own), which have been or may hereafter be declared such by Act of Congress, and over, under or across the navigable streams or waters of the United States.

"Provided, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads."

The defendant further states that Congress has also by a provision of the army appropriation Act for the fiscal year ending June 30, 1879, declared:

"Telegrams are authorized to be transmitted by railroad companies which may have telegraph lines, and which shall file their written acceptance of the restrictions and obligations imposed on telegraph companies by title Sixty-five of the Revised Statutes (that is, the said Act of July 24, 1866), for the government, and for the general public, at rates to be fixed by the government, according to the provisions

of title Sixty-five of the Revised Statutes." (Sec. 5268, U. S. Com. Stats., 1901; Federal Statutes Annotated, Vol. 7, p. 215 21 Stat., L. 31.)

The defendant states that said Act of March 19, 1898, is in contravention of Subsection 3, Section 8, Article 1, of the Constitution of the United States, granting complete and exclusive power to Congress to regulate commerce among the several States, and the operation of said Act lays a burden upon such commerce, and the instrumentalities thereof, such as defendant's said railroads in this State and other States connected with each other, so as to form continuous lines for the transportation of passengers, troops, government supplies, mails, freight and property on their way from one State to another, owned, used, operated and maintained by the defendant on, along and over the right of way of its said railroads employed in such commerce; and said Act of March 19, 1898, amounts to and operates as a regulation of commerce among the several States, and materially and substantially trammels, obstructs and interferes with such commerce, and is in conflict with the commerce clause of the Constitution of the United States and the provisions of the Acts of Congress approved June 15, 1866, July 24, 1866, and June 8, 1872, hereinabove referred to, and the Act to Regulate Commerce, approved February 4, 1887, and the several amendments thereto, and is, therefore, unconstitutional and void.

8½. The defendant states that Section 7 of said Act of March 10, 1898, prescribes the judgment that shall be entered upon the verdict of the jury, the last sentence of which is as follows:

"Now upon payment of said award either to the defendant or to the clerk of this court, and all costs in this behalf expended, said * * * Telegraph Company may enter upon said land and appropriate so much thereof as may be necessary, as prayed for in its petition."

The defendant states that such judgment leaves it to the discretion of the plaintiff telegraph company, in whose favor it shall be rendered, as to the quantity and what land or portion of the defendant Railroad Company's right of way such plaintiff shall enter upon and appropriate to its own uses and purposes, and thereby said Act in that respect operates to, and in its enforcement does, deprive the defendant of its property without due process of law, and denies to it the equal protection of the laws in violation of Section One (1) of the Fourteenth Amendment to the Constitution of the United States.

9. The defendant further states that although by Section 1 of said Act of March 19, 1898, it is provided "that the posts, arms, insulators, and other fixtures of a telegraph company's lines shall be erected and maintained on or along and upon the right of way of railroads in such manner as not to interfere with the ordinary use or the ordinary travel and traffic on such railroad, or that of any other telegraph line already constructed on the right of way of any railroad," nevertheless the said Act nowhere provides that the

erection or maintenance of a telegraph line on or along and upon the right of way of a railroad shall not obstruct or interfere with the use or the ordinary traffic of any other telegraph, telephone, or signal line not already, but hereafter, constructed on the right of way of any railroad by the railroad company which owns such right of way, and is compelled to construct, operate and maintain a telegraph, telephone or signal line of its own necessary to carry on its railroad business and control the movements of its passenger and freight trains, not to speak of such telegraph or telephone line or lines as it may choose and have the lawful right to erect, operate and maintain as a common carrier of interstate as well as intrastate traffic, or for commercial uses and purposes.

XIII.

The defendant states that since August 17, 1912, it has been necessary for it to have and operate a telegraph or telephone line and signal line established upon the rights of way of its railroad in this State aggregating over 1,500 miles, in order that it may safely, conveniently, promptly, successfully and efficiently conduct and carry on its business as a common carrier by railroad as well as a common carrier by telegraph or telephone, or both, and it has already and had, prior to the institution of this suit by plaintiff, located its telegraph or telephone line to be constructed and which it intends to construct on its said rights of way in this State as soon as plaintiff vacates and removes its poles, wires, cross-arms, fixtures and other appliances therefrom, which the plaintiff had been heretofore on or about August 5, 1912, notified by defendant in writing to do prior to December 1, 1912, and will establish, erect and place in operation the same, as it has the lawful right to do, on the same side of its said rights of way, and where the plaintiff's poles and wires are now located on defendant's said rights of way under the contract which expires on August 17, 1912, which is the best, most convenient, suitable, and in many places the only location thereon for defendant's telegraph or telephone or signal line, and where the cost of construction, operation and maintenance of such line will be the cheapest and most economical for the defendant herein, and where defendant as the owner thereof has the preferential right and is entitled to locate, establish, operate and maintain its own telegraph or
44 telephone or signal line for the conduct of its railroad business as well as its commercial business as a common carrier of messages, news, etc., for hire.

The defendant states that it now owns and has strung upon the poles of the plaintiff, located on the rights of way of defendant's railroads in this State, a large number of telegraph, telephone and signal wires which it operates and maintains in the conduct of its railroad business, exceeding 4,195 miles in length, which are devoted to its service alone, as shown by Exhibit A, filed herewith as part hereof.

The defendant states that by establishing its own telegraph, telephone and signal line for the conduct of its business on the same side of the rights of way of its railroads in this State where plaintiff's

line is now located, the defendant can, with far less expense for labor and materials, and at a saving of many thousands of dollars, detach its own wires and fixtures from the poles of the plaintiff and attach them ready for use upon defendant's own poles when erected along side and near to the existing line of poles, and this saving in the cost of constructing its new or own line of poles and wires will be availed of by the defendant upon the compliance by plaintiff with the written notice hereinabove referred to, and such construction has already been commenced and will be prosecuted until finished.

The defendant states that the continued operation and maintenance by plaintiff of its line of poles and wires for telegraph purposes against the defendant's will and consent after August 17, 1912, on the same side of the rights of way of defendant's said railroads and alongside or near to the defendant's telegraph or telephone line when erected and placed in operation has already interfered, and will continue to greatly interfere with the free use and service of the same; that for proper and effective operation of its said telegraph or telephone lines, as well as signal lines for the safe and efficient operation of its engines and trains, it is essential and necessary that they should be free from all electrical disturbances and removed from all zones of electrical currents of influence, and if not so located or removed and protected, the safe and efficient operation of defendant's engines and trains will be obstructed and prevented, and if plaintiff or any other corporation transmitting electricity by wire shall be allowed to use the same side of defendant's rights of way and thus create other zones of electricity, or if another telegraph line is allowed to be constructed, established, operated or maintained

parallel to defendant's wires and lines, there will result, necessarily, a conflict with and a disturbance of the defendant's use of its own lines, both by induction and conduction, which will not only prevent the defendant from properly discharging its duties to the public in the transmission of commercial telegraph and telephone messages, but will endanger the correct and safe operation and movements of its own trains, and will thus endanger the lives of its employees and passengers who use its said lines of railroad and occasion loss and damage to the freight traffic, mails, baggage, express, etc., carried over the same.

The defendant states its location already made prior to the institution of this action upon its rights of way in this State of its telegraph, telephone and signal line follows in all substantial or material respects the same course and location and the same side of its rights of way as the existing telegraph line of said rights of way operated by plaintiff, and if plaintiff should be allowed in this condemnation proceeding to continue its use and occupation indefinitely, permanently or perpetually, as it seeks in this condemnation proceeding to do, of that portion of defendant's rights of way where its poles and wires are at present located, such use and occupancy will greatly and irretrievably obstruct and interfere with, damage and practically destroy defendant's use, occupancy and control of its own property, and impair the value thereof, and interfere with the safe and efficient operation and maintenance of defendant's road-bed and tracks

for railroad business and purposes, and with defendant's own telegraph, telephone and signal lines used and to be used by it in the necessary and constant movements and operations of its own engines and trains in serving the public in its capacity as a common carrier by railroad, telegraph and telephone.

XIV.

The defendant states that notwithstanding the permissive Act of Congress, approved July 24, 1866, hereinabove referred to, prohibits a telegraph company from constructing or maintaining its telegraph line along any of the military or post-roads of the United States, such as the railroads of the defendant are in this State, so as to obstruct or interfere with the ordinary travel on such military or post-roads, and notwithstanding by the provisions of Section 1 of said Act of March 19, 1898, were it valid for any purpose, a telegraph company is prohibited from erecting or maintaining the posts, arms, insulators and other fixtures of its telegraph line on or along and upon the right of way of railroads in such manner as
46 to interfere with the ordinary use or ordinary travel and traffic on such railroads, or that of another telegraph line already constructed on the right of way of any railroad, the said last named Act nowhere provides for the introduction of testimony or evidence on the question of obstruction or non-obstruction, interference or non-interference which would be caused by the construction, operation and maintenance of a telegraph line on the defendant railway company's right of way in a condemnation proceeding instituted by a telegraph company for the purpose of acquiring a right of way for its telegraph line on or along and upon the right of way of a railway company, and no issue of that character is provided by said Act to be made up between the parties in such condemnation proceeding, nor is any such issue or question of fact required or allowed by said Act to be investigated or determined either by the County Court or the jury in such proceeding, but the investigation and determination of the court and jury therein is confined entirely and exclusively to the one question of damages sustained by the railway company for the land which will be taken and occupied by the telegraph company in the construction, maintenance and operation of its telegraph line located on the railway company's right of way and the incidental damages accruing to the remainder of its right of way for railroad purposes; nor does said Act provide for the investigation and determination on appeal to the Court of Appeals or by a jury, according to the course of the common law, of such question of fact or the question of obstruction or non-obstruction or interference or non-interference with the use and ordinary travel and traffic on the railroad or railroads of the railway company made defendant in such condemnation proceeding by the construction, operation and maintenance of a telegraph line on its railroad right of way. Defendant states that it is thus, by the provisions of said Act, deprived of a judicial hearing on said vital question of fact and of its property without due process of law, and denied the equal protec-

tion of the laws guaranteed to it by Section One of the Fourteenth Amendment to the Constitution of the United States.

The defendant states said Act of March 19, 1898, nowhere provides for the determination in the proceeding to condemn therein prescribed, either by the County Court or the jury in that court, or upon appeal by the Appellate Court, or by a jury, according to the course of the common law, the issue or the question of the actual necessity for the plaintiff therein to take, injure or destroy 17 for its uses and purposes, the specific private property of the defendant therein sought to be condemned and already devoted to another and different public use, whereby said Act in its necessary operation and enforcement operates to take the private property of the railway company made defendant therein, without a judicial hearing on such issue or question of fact, and without due process of law, and denies to the defendant railway company in such proceeding the equal protection of the laws guaranteed to it by Section One of the Fourteenth Amendment to the Constitution of the United States.

XV.

The defendant states that prior to the filing of plaintiff's petition herein there had existed divers agreements between plaintiff and defendant, all of which were on June 18, 1884, merged into a new written agreement or contract, under the provisions of which the plaintiff had the right to erect along the line of the rights of way of the defendant a single telegraph line, and in the construction thereof to erect poles, put cross-arms thereon, string wires on such cross-arms and do other things necessary for the effective carrying on of a telegraph business. It was further provided therein that the defendants should have the right to place its own telegraph and signal wires upon the poles of the plaintiff for the purpose of conducting its railroad business, and should have the exclusive use of said wires and the preferential and joint use of other wires of the plaintiff attached to such poles.

The defendant states that under and by virtue of said contract both the plaintiff and the defendant used the said poles and the wires aforesaid in carrying on their respective businesses.

The defendant states that said contract was, by its terms, to remain in force for a period of twenty-five (25) years from and after July 1, 1884, "and thereafter until the expiration of one year after written notice shall have been given by one of the parties to the other of a desire or intention to terminate the same."

The defendant states that the plaintiff gave such notice to the defendant, as heretofore stated, on August 17, 1911, that the said contract would terminate between them one year after the delivery of said notice, to wit, on August 17, 1912.

In said contract it was nowhere provided that upon its expiration the poles, wires, cross-arms, batteries, instruments, fixtures and other appliances should remain the property of the plaintiff, or that 48 plaintiff should have the right to remove the same or any part thereof from the premises of defendant's rights of way.

The defendant is advised and avers, upon the expiration of said contract, the plaintiff was bound to vacate the premises and was entitled, at most, to remove all such poles, wires, cross-arms, batteries, instruments, fixtures and other appliances, upon notice from defendant so requiring, within a reasonable time, and in default thereof or failure or refusal by plaintiff to comply with such notice, the defendant would be entitled to take possession, appropriate and use all and singular the said poles, cross-arms, wires, batteries, instruments, appliances and other fixtures, or so much thereof as might, on or after the date fixed for such vacating and removal, be or remain on the premises or defendant's rights of way, with the right of defendant to hold, use, operate, maintain or otherwise dispose of the same as its own property, and to refuse to longer permit plaintiff to remove or use the same in any manner or for any purpose.

The defendant states, in pursuance of its legal rights and in order to obtain the uninterrupted and unobstructed use and possession of the whole of its said rights of way in the State of Kentucky and other States, and be able to construct, operate and maintain its own telegraph, telephone and signal lines thereon, it caused to be delivered to the plaintiff's manager in the City of Louisville, Kentucky, on August 5, 1912, and to plaintiff's President and chief officer in the City and State of New York on or about August 7, 1912, its written notice dated August 5, 1912, signed by its President and attested by its Secretary, under the official seal of the defendant addressed to the plaintiff, in the following words and figures, to wit:

"Louisville & Nashville Railroad Company,

President's Office, Louisville, Ky.

Milton H. Smith, President.

August 5, 1912.

To the Western Union Telegraph Company of New York:

1. You are hereby notified by the undersigned, Louisville & Nashville Railroad Company, that on and after August 17, 1912, the use and occupation by you of its railroad rights of way, or any part thereof, situated in the States of Kentucky, Ohio, Indiana, Illinois, Missouri, Tennessee, Virginia, North Carolina, Georgia, Alabama, Florida, Mississippi, and Louisiana, and of its buildings, offices, stations and premises, or any part thereof, as and for a telegraph line composed of poles, cross-arms, wires, batteries, instruments, 49 appliances and other fixtures, will be without its permission and against its will and consent.

2. You are hereby further notified to vacate its said railroad rights of way, buildings, offices, stations and premises, and to commence in good faith to remove therefrom immediately after August 17, 1912, and not later than September 1, 1912, all and singular the said poles, cross-arms, wires, batteries, instruments, appliances and other fixtures composing your said telegraph line now and heretofore erected,

operated and maintained by you under the provisions of the written contract dated June 18, 1884, between you and the undersigned company, which you, by your written notice dated August 11, 1911, and received by the undersigned company August 17, 1911, voluntarily terminated upon the expiration of one year thereafter, to wit, on August 17, 1912.

3. You are hereby further notified and required to diligently and continuously prosecute said work of removal from its commencement as aforesaid, and to complete the same prior to December 1, 1912; and to enable you to do so within the period stated, the undersigned company hereby offers and undertakes to furnish all necessary and suitable engines and cars for that purpose, such cars to be loaded by your employes at and between stations on each of its several lines or divisions of railroad in said States, at such points thereon and at such times as may be reasonably designated by you in writing delivered, with proper shipping directions to its General Manager, the undersigned company being afforded a reasonable opportunity to detach and remove its own wires, fixtures, etc., on such poles, and to keep out of your way in said work of removal on your part; and the undersigned company further offers and undertakes to transport the said poles, cross-arms, wires, batteries, instruments, appliances and other fixtures thus loaded, at its regular legal rates to destination, if on its own lines, and, if not, then to deliver the same to its connecting lines, as in the case of the carriage of like commodities and materials for other shippers.

4. You are hereby further notified that in the meantime, and before you shall have effected such removal as aforesaid, all services rendered by you for or to the undersigned company, its officers, agents or employes, in the transmission of messages on or in the conduct of its business by telegraph over your wires in said telegraph line, or any portion thereof, or over any other telegraph line owned and operated by you, and in the receipt and delivery of such messages, will be paid for by the undersigned company in cash or at the end of each month during said period between August 17th and December 1, 1912, at your regular legal rates and charges for like services rendered to other patrons; that between the dates last named the undersigned company will accept for furnishing office room and operators to transact your commercial business at points where you do not maintain a separate office, 25% of the receipts for messages received and forwarded to one of your offices, or received from one of your offices and delivered to addressee, and 50% of the receipts when received and delivered by the agent of the undersigned company until your said telegraph line connecting therewith shall have been removed as aforesaid, but, in no event longer than November 30, 1912; that the undersigned company will also in like manner pay you the reasonable value of the use of your wires as it may continue to use along its said lines of railroad, and in cities and towns along the same or at the termini thereof after August 17, 1912, and prior to December 1, 1912, and for the use, if any, of the instruments, main and local batteries, terminal facilities,

testing service, etc., for the operation of such wires as the undersigned company owns on said poles, as well as for such other services as you may perform for it between the dates last named.

5. You are hereby further notified that, for all transportation and other services rendered by the undersigned company to or for you, or your officers, agents or employes, after August 17, 1912, the undersigned company's regular legal rates and charges will be charged and collected from you in cash or at the end of each month during the period aforesaid.

6. You are hereby further notified that all officers, agents and employes of the undersigned company to whom you have issued franks for the current year, by which their messages over your telegraph lines on or for the conduct of the business of the undersigned company, will be instructed to return to you such franks on or prior to August 17, 1912; and you are hereby requested to instruct all of your officers, agents and employes to whom the undersigned company has issued passes for the current year over its lines, or any of them, to return such passes to its General Manager on or prior to the last named date.

7. You are hereby further notified that for your continued use and occupation as and for a telegraph line, of the undersigned company's said right of way, buildings, offices, stations and premises, or any part thereof, in said States, or either of them, after August 17, 1912, and prior to December 1, 1912, you will be held liable and required to pay to the undersigned company the full value thereof, as well as all damages it shall sustain by reason or on account of being prevented from erecting, operating and maintaining its own telegraph or telephone line where the same has been located on its said rights of way, and by reason and on account of such use and occupation of its said rights of way and premises by you against its will and consent, and wrongfully and without right after the termination of said existing contract.

8. You are hereby further notified that in default of your vacating the undersigned company's said rights of way and premises, or in the event of your failure or refusal to remove therefrom your poles, cross-arms, wires, batteries, instruments, appliances and other fixtures aforesaid, or any part thereof, prior to December 1, 1912, as in this notice hereinabove set forth, then, and in that event, the undersigned company will take possession, appropriate and use all and singular the said poles, cross-arms, wires, batteries, instruments, appliances and other fixtures, or so much thereof as may, on or after the last named date, be or remain on the undersigned company's said rights of way or premises in all or either of said States, and hold, use, operate, maintain or otherwise dispose of the same as its own property, and refuse to longer permit you to remove or use the same in any manner or for any purpose, and will use all legitimate means in its power to prevent you from interfering with its possession, use and ownership thereof.

9. You are hereby further notified that inasmuch as the undersigned company can not erect its own telegraph or telephone line where the same has been located on its said right of way while your telegraph line is there operated and maintained, the undersigned company will by necessity be compelled to make use of your existing telegraph poles and wires thereon for the transmission of messages in the conduct of its railroad business until your said line is removed therefrom as hereinabove set forth, you will understand that such compulsory use of your poles and wires is not and must not be construed to be an acquiescence by the undersigned company in your continuance upon or continued use and occupation of its said rights of way.

In witness whereof, the Louisville & Nashville Railroad Company has hereto caused its name to be subscribed by M. H. Smith, its President, and its official seal to be affixed by J. H. Ellis, its Secretary, this the date first above written.

[SEAL.] LOUISVILLE & NASHVILLE RAILROAD
COMPANY.

By M. H. SMITH,
President."

Attest:

J. H. ELLIS,
Secretary.

STATE OF KENTUCKY,
Jefferson County, act:

The affiant, Ben J. Sandmann, states that he served the foregoing notice from the Louisville & Nashville Railroad Company to the Western Union Telegraph Company of New York by delivering a true copy thereof to Charles Smith, Manager of the latter company at Louisville, Kentucky, in his office on August 5, 1912, at 36 minutes past 5 o'clock p. m.

He further states that he is over sixteen years of age, and is not a party to nor interested in the subject-matter set forth in said notice.
(Signed) B. J. SANDMANN.

Subscribed and sworn to before me by said Sandmann, as witness my hand and official seal hereto affixed, this August 7, 1912. My commission expires on the 24th day of January, 1914.

[SEAL.] (Signed) G. W. B. OLMSTEAD,
Notary Public, Jefferson County, Ky.

The defendant states that notwithstanding the plaintiff gave defendant on August 17, 1911, one year's written notice, terminating on August 17, 1912, said written contract of June 18, 1884, the plaintiff postponed the institution of this suit to condemn a right of way for a telegraph line over defendant's railroad rights of way in this State until July 9, 1912, on which summons issued against and was served on defendant, returnable October 14, 1912.

The defendant states, however, that prior to the institution of this

suit in this court the plaintiff brought its condemnation suit against this defendant under said Act of March 19, 1898, in the County Court of Jefferson County, in this State, on December 21, 1911, to condemn for its uses and purposes as a telegraph line the same land and portions of the same railroad rights of way of the defendant in this State as are sought to be condemned herein, and, after the judge of said County Court had overruled defendant's objection and
53 protest and held that said County Court had jurisdiction, under said Act, to hear and determine said suit, and was about to proceed to do so, the defendant instituted on March 8, 1912, in the Circuit Court of Jefferson County, in this State, its suit against said judge, constituting said County Court, for a writ of prohibition to restrain and prohibit him from proceeding or taking any further step in said condemnation suit in said County Court, and obtained a restraining order from said Circuit Court enjoining and preventing him from doing so pending the said motion, of which notice had been duly served upon him, for such writ of prohibition on the ground that he was proceeding out of and beyond his jurisdiction as said County Court. But defendant states that on April 15, 1912, the day set for the hearing of said motion for a writ of prohibition as aforesaid in said Circuit Court, the plaintiff appeared by counsel and produced a copy of the order of said County Court entered April 13, 1912, showing the plaintiff had voluntarily dismissed its said condemnation suit in said County Court, without prejudice, and that the same was no longer pending in that court, and upon this showing said Circuit Court dismissed defendant's said suit for a writ of prohibition, without prejudice. The defendant states that the plaintiff from and after April 15, 1912, delayed bringing any other suit or proceeding in any court to condemn defendant's lands and rights of way in this State for a telegraph line, under said Act of March 19, 1898, until this suit was commenced in this court on July 9, 1912, or for a period of nearly three months.

The defendant further states that notwithstanding the service of the defendant's written notice, dated August 5, 1912, upon the plaintiff to vacate the defendant's said premises and remove therefrom its poles, wires, cross-arms, batteries, instruments, fixtures and other appliances, beginning not later than September 1, 1912, and completing the same prior to December 1, 1912, which was and is a reasonable time therefor, the plaintiff has so far made no effect to do so, but is continuing to use and occupy defendant's rights of way for its telegraph line wrongfully and without right, and against the will and consent of the defendant, and in defiance and utter disregard of the defendant's said notice to its Superintendent and President of August 5, 1912.

This defendant has been, since August 17, 1912, and is still being prevented by plaintiff from constructing, operating and maintaining its own telegraph or telephone line where it has been located
54 on its rights of way, and will be prevented by plaintiff from doing so until plaintiff's poles, wires, cross-arms, batteries, instruments, fixtures and appliances shall have been removed from defendant's railroad rights of way in this State, in accordance with

defendant's written notice to it of August 5, 1912, or until the expiration of said period on December 1, 1912.

XVII.

The defendant states that the growing demands of the Interstate Commerce Commission and of the Railroad Commission of the State of Kentucky, and of the public, are such that in the near future it is probable that the defendant will be required to make constructions upon its rights of way which will be inconsistent with the presence upon said right of way of a telegraph line of the plaintiff, distinct and independent of the telegraph line of the defendant necessary for its own uses as a railroad, and necessary under the amendment of its charter aforesaid for the service of the public, for example:

The demands of business, the expedition of passenger trains, the safety of both passenger and freight trains, are demanding of the defendant and other roads similarly situated that its lines of roads should be double-tracked, and the defendant has commenced such double-tracking and progressed upon its main lines in this State to a considerable extent therein, viz., 88 miles or more.

The defendant files herewith as part hereof Exhibit B, showing the miles of second main line or double-track miles completed, the divisions on which the same are located, and the mileage of second or double-track under construction in this State, and defendant is still engaged in such double-tracking its important main lines in this State, and defendant avers that such double-tracking requires the use and occupancy by it of the full width of its rights of way, which are not broad enough to accommodate, consistently with safety, and with the ordinary use and travel of its railroads, the said double-tracks, its side tracks, its own line of telegraph and its signal lines, and, in addition thereto, the telegraph or telephone line of plaintiff.

The Commissions aforesaid, and public sentiment, and the safety of persons transported upon the lines of road of the various railroads throughout the United States, including the defendant, are insistent that there shall be established a system of block signals, or other equivalent safety devices for the operation of all trains.

55 The defendant has already installed many miles of such signal wires in this State, and is now engaged in the establishment of such a system upon other portions of its lines in this State, and it may be incumbent upon it very soon to establish such system upon all portions of its lines.

The establishment of such a system would require the construction thereof upon one side of the tracks of the defendant, and all of the side upon which it is so constructed would be necessary for the use of the said system, so that it would be impracticable to place the telegraph or telephone lines of the plaintiff upon said side, and would relegate to the other side not only the side tracks of the defendant, but also the telegraph or telephone lines of the defendant used in its railroad business and for the public, and, if it were practicable, the lines of the plaintiff.

In its petition the plaintiff states that all of its lines of telegraph on defendant's rights of way in this State are single lines, except between Highland Park, Jefferson County, Kentucky, and Colesburg, Hardin County, Kentucky, a distance of thirty (30) miles; Tunnel Hill, Hardin County, Kentucky, and the north end of the defendant's yards at Bowling Green, Warren County, Kentucky, a distance of seventy-four and fifty one-hundredths (74.50) miles, and the south end of defendant's yards at Bowling Green, Warren County, Kentucky, and Memphis Junction, Warren County, Kentucky, a distance of four (4) miles, a total distance of one hundred and eight and fifty one-hundredths (108.50) miles, which are double lines of telegraph.

The defendant states that said double lines are located, one on each side of defendant's right of way, or the tracks laid thereon, between the points aforesaid.

The defendant states that the plaintiff has in no event, even if the Act of March 19, 1898, hereinabove referred to, were valid, to take or acquire by this proceeding or otherwise, without the consent of the defendant, a right of way over defendant's rights of way in this State for a double telegraph line or a line on each side thereof, or of the railroad tracks of the defendant laid thereon.

XVIII.

The defendant, further answering, states that a very large per cent, more than 71 per cent, of all traffic carried by it and passing over its lines in this State, portions of the right of way of which the plaintiff seeks to have condemned herein for its uses and purposes, is interstate commerce, in respect to which the defendant is by law subject to the control of the Congress of the United States, 56 which has, in the Act to Regulate Commerce and the several amendments thereto, directly and expressly legislated in reference to matters connected with and relating to the safety of said interstate traffic, both passengers and freight, as well as the employees engaged therein.

Congress, in the exercise of its legitimate and paramount powers and authority over and concerning commerce among the several States, under Subsection three (3), Section Eight (8), Article one (1) of the Constitution of the United States, has already assumed the supervision and control over defendant's railroads in this State, in connection with its own railroads as well as those owned and operated by other common carriers in other States; and defendant avers that the use and occupation by defendant of that portion of its rights of way sought to be condemned herein by the plaintiff for its uses and purposes as a telegraph line by reason of the danger from falling poles, cross-arms, fixtures and wires, during wind storms, which frequently occur in this State, the obstruction of the view of signals by locomotive engineers and other trainmen while engaged in operating defendant's trains, both passenger and freight, and the entrance, movements and use by plaintiff's own employees upon its said rights of way at will, and at any time, day or night, or whenever repairs, renewals or reconstruction of plaintiff's telegraph lines or poles and

wires may be needed or required, would materially and substantially impair the safety of transporting freight and passengers, as well as defendant's employees and equipment while engaged therein on and over its said railroads in this State, and would be in violation of both the letter and spirit of the said Act of Congress, approved July 24, 1866, and said Act to Regulate Commerce and the amendments hereto.

The defendant states that the portion of its rights of way sought to be condemned herein by the plaintiff for its uses and purposes is essential and absolutely necessary to the defendant for the construction, operation and maintenance of its own telegraph or telephone or signal line which has been located thereon for defendant's own uses and purposes, for the movement of its trains and the safe maintenance of its railroad bed and structures.

The defendant states its business is increasing rapidly, requiring the construction of double tracks, second tracks, side tracks, industrial tracks, the elimination of grades and curves, the installation of signal structures and devices, in the construction of all of which it is necessary to move, from time to time, telegraph poles and wires from one location to another; and should plaintiff be allowed the permanent use of any specific portion of the defendant's rights of way, the defendant's business in interstate, as well as intrastate commerce, will be seriously, directly and materially handicapped, trammelled and burdened, and, therefore, the defendant charges that the condemnation of any specific portion of its rights of way for doing and carrying on a commercial telegraph by plaintiff would amount to the taking, injuring and destroying of so much of its rights of way already devoted to a public service in the transportation of interstate traffic, and would lay a lasting burden upon interstate commerce, in contravention of Subsection 3, Section 8, Article 1, of the Constitution of the United States, which vests in the Congress of the United States alone the power to regulate commerce among the several States, and would violate the laws enacted by Congress in pursuance of said constitutional provision.

XIX.

The defendant states that no actual necessity existed at the institution of this proceeding, or now exists, for the taking or condemnation of any part of defendant's rights of way in this State by plaintiff for the construction, operation and maintenance of a telegraph line by reason of the following facts:

The plaintiff made and entered into a written contract with the American Telephone & Telegraph Company, a corporation organized and existing under the laws of the State of New York, dated December 15, 1909, whereby the plaintiff and the latter company, acting for itself, and the Cumberland Telephone & Telegraph Company and other subsidiary telephone companies, owning and operating telephone lines in the State of Kentucky, as well as all other controlled and allied telephone lines of the said American Telephone & Telegraph Company, agreed to exchange with each other the use of all their plants and facilities for the transmission of dispatches, news,

messages, information, etc., and the delivery and receipt thereof for the public at large, which arrangement, by the terms of said contract, is now in full force and effect, and will continue to be until the expiration of the said contract on December 15, 1934, and thereafter until terminated by one year's written notice from either party to the other as therein provided.

The defendant states that by reason of said contract the plaintiff is enabled to, and does, reach, send to and receive from all the
58 points, places, towns, stations, and cities on the lines of the defendant in the State of Kentucky, dispatches, news, messages, information, etc., equally as promptly and efficiently as it does now or has heretofore over its telegraph line located on defendant's rights of way in this State, and there is not, and has not been since August 17, 1912, any actual necessity for the plaintiff to continue its telegraph line on, over or along defendant's rights of way, or any part thereof, in this State in order to perform such service, a copy of which contract is herewith filed as part hereof, marked Exhibit C.

Defendant states that the plaintiff has since August 17, 1912, cut out its service at ninety-nine (99) offices of the defendant in as many places, towns and cities in the State of Kentucky where a telephone exchange covered by the provisions of said contract of December 15, 1909, is established, and has given defendant notice that it would, and it does, handle its business through such telephone exchanges instead of at the offices of the defendant. A list of said places, towns and cities on defendant's railroads in the State of Kentucky is set forth in Exhibit D, filed herewith as part hereof.

Defendant states that in addition to the places, towns and cities above named the plaintiff can, under the provisions of said contract of December 15, 1909, cut out its service at all the offices of the defendant at all other places, towns and cities in this State and use the offices, telephone exchanges and facilities thereat and the telephone lines leading to and therefrom, and will do so in the event this proceeding shall be dismissed or its effort to condemn defendant's rights of way herein be denied, and, therefore, no actual necessity exists, or will hereafter exist, for the plaintiff to acquire by this proceeding any part of the defendant's rights of way in this State for the construction, operation and maintenance of a telegraph line or offices thereon for the receipt, transmission or delivery of messages, news information, etc.

The defendant further states that the plaintiff, since August 17, 1912, has given defendant notice that it has cut out its service at divers other places, towns and cities reached by defendant's lines in other States and will use hereafter for its service at said points the telephone exchanges located therein, which it has the right to do under said contract of December 15, 1909.

Defendant states that there are open and free to the plaintiff, in addition to private property which it may acquire by purchase, divers
59 sundry and numerous public roads and other highways and various post-roads between all places, stations, towns and cities now served by plaintiff in this State parallel to and at short distances from defendant's rights of way on which its railroads are constructed, operated and maintained in this State on, over and along

which public roads, highways and post-roads the plaintiff is entitled to, and can, construct, operate and maintain its telegraph lines between such points, stations, towns and cities without being subjected to any cost or charge for such right of way, and can perform its services as a common carrier of dispatches, messages, news, information, etc., on such locations more economically and with less cost for maintenance, repairs, renewals, etc., than it can on defendant's rights of way since August 17, 1912, and there is, therefore, no necessity whatever for the standpoint of either the plaintiff or the public it serves for a continuance of telegraph lines by plaintiff on, over and along defendant's rights of way in this State.

XX.

The defendant states that even if the mode of condemnation proceeding provided in the Act of March 19, 1898, now Section 1679a, Kentucky Statutes, were valid for that or any purpose, it does not bear the construction sought to be placed thereon by plaintiff herein, or vest or attempt to vest jurisdiction in the County Court or this court of such a proceeding as this over any portion of the rights of way of any of the defendant's railroads, except such of them as pass through, into, or have one of their termini in the County of Jefferson, in this State, and the only railroads owned by defendant in this State, where any parts of the rights of way thereof lie in this County, are those described in Paragraphs 1, 5, 25 and 32 of plaintiff's petition, commonly known as the Main Stem, the Cincinnati Division, Shelby Branch, and the Louisville Transfer Track, respectively. Over none of the other railroads described in plaintiff's petition has the County Court of Jefferson County or this court any jurisdiction herein for condemnation purposes or otherwise, nor has this court any jurisdiction to hear or determine this proceeding as to any of defendant's railroads situated in the Eastern Judicial District of Kentucky, even if said Act were valid.

The defendant states that no part of the rights of way of the Chesapeake & Nashville Division, located wholly in Allen County, the Clarksville & Princeton Branch (part of) Gracey, Ky., to Kentucky-Tennessee State line, located wholly in Christian County, Kentucky, 23.17 miles—the Louisville & Atlantic Railroad located wholly in Woodford, Jessamine, Madison, Estill and Lee Counties, and described in Paragraphs 4, 6 and 26, respectively, and the line of railroad described in Paragraph 33 of plaintiff's petition, being a part of defendant's Paducah & Memphis Division, leased to the Nashville, Chattanooga & St. Louis Railway, described as located in the Counties of McCracken, Marshall and Calloway, in this State, a distance of 49.40 miles, adjoin or connect with any other line of railroad owned by defendant, any part of the right of way of which is situated in Jefferson County, in this State.

XXI.

The defendant states that the plaintiff's petition does not state or contain any certain or definite description of the land or right of way belonging to the defendant sought to be condemned, or such description as would enable the court to identify or locate that portion of defendant's right of way sought to be condemned, nor is even the side of defendant's right of way or of the railroad tracks laid thereon constituting any of the lines of railroad mentioned in the petition stated or given, nor is the property sought to be condemned, defined or set forth by metes and bounds and courses and distances, or with such precision, definiteness or certainty as to enable the court or any one skilled in such matters to locate the boundaries or quantity required or sought to be condemned by the plaintiff, or so that the defendant may know the extent of the portion of its respective rights of way which plaintiff seeks to condemn herein, nor is the number of poles to the mile or their distance apart, nor the number or length of cross-arms on each pole, nor the number or character of the wires to be strung, operated and maintained thereon, nor the width of the ground they will cover stated or specified in plaintiff's petition, and without such description neither the court nor a jury can assess or determine the value of the land or right of way of defendant which may be taken, injured or destroyed, or the damages which defendant will sustain and which will accrue to the remainder of its rights of way by reason of the construction, operation and maintenance of a telegraph line by plaintiff as set forth in its petition.

XXII.

The defendant for further answer states that the railroads described in the numbered paragraphs of plaintiff's petition
 61 had, prior to the institution of this suit, been respectively mortgaged by deeds of trust to the trustees whose names and addresses or places of residence, together with the dates of the several mortgages, the amount of bonds secured thereby outstanding and unpaid when this suit was brought, as well as at this time, for which amounts liens of record in the several counties wherein the said mortgage property is situated, still exist on said railroads and dates of maturity, are herein set out as follows:

1. Paragraph 1. Main Stem, Louisville to Kentucky-Tennessee State Line.

The property of this division is covered by the following mortgages:

Main Stem, Louisville to Kentucky-Tennessee State Line.

The property of this division is covered by the following mortgages:

First Mortgage.

General Mortgage, Central Trust Company of New York, Trustee, 54 Wall Street, New York City.

Date of Mortgage, June 1, 1880, maturity June 1, 1930.

Total amount outstanding September 30, 1912, \$4,726,000.00.

Second Mortgage.

Unified 50-year Four-per-cent Gold Mortgage, Central Trust Company of New York, Trustee, 54 Wall Street, New York City.

Date of Mortgage, June 2, 1890, maturity, July 1, 1940.

Total amount outstanding September 30, 1912, \$64,139,000.00.

2. Paragraph 2, Bardstown & Springfield Branch, Bardstown Junction to Bardstown.

The property of this branch is covered by the following mortgages:

First Mortgage.

General Mortgage, Central Trust Company of New York, Trustee, 54 Wall Street, New York City.

(Bardstown Junction to Bardstown, Ky., 17.37 miles.)

Date of Mortgage, June 1, 1880, maturity June 1, 1930.

Total amount outstanding September 30, 1912, \$4,726,000.00.

First Mortgage Five Per Cent 50-year Gold, United States Trust Company of New York, Trustee, New York City.

(Bardstown to Springfield, Ky., 20.07 miles.)

Date of Mortgage, April 30, 1887, maturity May 1, 1937.

Total amount outstanding September 30, 1912, \$1,764,000.00.

Second Mortgage.

Unified 50-year Four Per Cent Gold Mortgage, Central Trust Company of New York, Trustee, 54 Wall Street, New York City.

Date of Mortgage, June 2, 1890, maturity July 1, 1940.

Total amount outstanding September 30, 1912, \$64,139,000.00.

3. Paragraph 3, Bloomfield Branch, Shelbyville to Bloomfield 26.72 miles.

The property of this branch is covered by the following mortgage:

First Mortgage.

Unified 50-year Four per cent Gold Mortgage, Central Trust Company of New York, Trustee, 54 Wall Street, New York City.

Date of Mortgage, June 2, 1890, maturity July 1, 1940.
Total amount outstanding September 30, 1912, \$64,139,000.00.

4. Paragraph 4, Chesapeake & Nashville Branch, Kentucky-Tennessee State Line to Scottsville.

The property of this branch is covered by the following mortgage:

First Mortgage.

Gallatin & Scottsville Railway First Mortgage, Louisville & Nashville Railroad Company, Trustee:

Date of Mortgage, October 15, 1906, maturity July 1, 1931.
Total amount outstanding September 30, 1912, \$309,000.00

5. Paragraph 5, Cincinnati Division, Louisville to Cincinnati.

The property of this division is covered by the following mortgages:

63

First Mortgage.

Louisville, Cincinnati & Lexington Railway General Mortgage, Mercantile Trust Company, Trustee, New York City.

Date of Mortgage, November 1, 1881, maturity November 1, 1931.
Total amount outstanding September 30, 1912, \$3,258,000.00.

Newport & Cincinnati Bridge Company General Mortgage—Farmers Loan & Trust Company, Trustee, New York City (Newport, Ky., to Kentucky-Ohio State Line—.54 mile).

Date of Mortgage, July 1, 1895, maturity July 1, 1945.
Total amount outstanding September 30, 1912, \$1,400,000.00

Second Mortgage.

Unified 50-year Four per cent Gold Mortgage, Central Trust Company of New York, Trustee—54 Wall Street, New York City.

Date of Mortgage, June 2, 1890, maturity July 1, 1940.
Total amount outstanding September 30, 1912, \$64,139,000.00.

Third Mortgage.

Atlanta, Knoxville & Cincinnati Division Four per cent Gold Mortgage, United States Trust Company of New York, Trustee:

New York City (Latonia, Ky., to Kentucky-Ohio State Line 4.12 miles).

Date of Mortgage, April 1, 1905, maturity May 1, 1955.
Total amount outstanding September 30, 1912, \$24,360,000.00.

6. Paragraph 6, Clarksville & Princeton Branch (Part of Gracey to Kentucky-Tennessee State Line, 23.17 Miles).

The property of this branch is covered by the following mortgages:

First Mortgage.

First Mortgage Five per cent 50-year Gold, United States Trust Company of New York, Trustee—New York City.

Date of Mortgage, April 30, 1887; maturity, May 1, 1937.

Total amount outstanding September 30, 1912, \$1,764,000.00.

64

Second Mortgage.

Unified 50-year Four per cent Gold Mortgage, Central Trust Company of New York, Trustee—54 Wall Street, New York City.

Date of Mortgage, June 2, 1890; maturity, July 1, 1940.

Total amount outstanding September 30, 1912, \$64,139,000.00.

7. Paragraph 7, Greensburg Branch from C. & O. Junction to Greensburg.

The property of this branch is covered by the following mortgage:

First Mortgage.

Unified 50-year Four per cent Gold Mortgage, Central Trust Company of New York, Trustee—54 Wall Street, New York City.

Date of Mortgage, June 2, 1890; maturity, July 1, 1940.

Total amount outstanding September 30, 1912, \$64,139,000.00.

8. Paragraph 8, Cumberland Valley Division, Corbin to Kentucky-Tennessee State Line (Erroneously Referred to in the Petition as State Line Between Ky. and Va.).

The property of this division is covered by the following mortgages:

First Mortgage.

First Mortgage Five per cent 50-year Gold, United States Trust Company of New York, Trustee, New York City.

Date of Mortgage, April 30, 1887; maturity, May 1, 1937.

Total amount outstanding September 30, 1912, \$1,764,000.00.

Second Mortgage.

Unified 50-year Four per cent Gold Mortgage, Central Trust Company of New York, Trustee—54 Wall Street, New York City.

Date of Mortgage, June 2, 1890; maturity, July 1, 1940.

Total amount outstanding September 30, 1912, \$64,139,000.00.

65 9. Paragraph 9, Chenoa Branch, Cumberland River and Tennessee Junction to Chenoa, Ky.

The property of this branch is covered by the following mortgage:

First Mortgage.

Unified 50-year Four per cent Gold Mortgage, Central Trust Company of New York, Trustee—54 Wall Street, New York City.

Date of Mortgage, June 2, 1890; maturity, July 1, 1940. Total amount outstanding September 30, 1912, \$64,139,000.00.

10. Paragraph 10, Elkton & Guthrie Railroad.

While this railroad is not owned by this defendant, it is operated for its owners under a contract. There was a mortgage executed by the Elkton & Guthrie Railroad Company thereon December 1, 1904, to Seymour H. Perkins, of Elkton, Ky., Trustee, under which bonds to the amount of \$25,000.00 were issued to the defendant company, bearing interest at the rate of five (5) per cent per annum, all of which except ten (10) have been taken up by the mortgagor.

11. Paragraph 11, Henderson Division, Kentucky-Tennessee State Line to Henderson (Including Henderson Bridge).

The property of this division is covered by the following mortgages:

First Mortgage.

Evansville, Henderson & Nashville Division First Mortgage, Central Trust Company of New York, Trustee, 54 Wall Street, New York City (Henderson to Kentucky-Tennessee State Line 97.77 miles).

Date of Mortgage, December 6, 1879; maturity, December 1, 1919. Total amount outstanding September 30, 1912, \$1,080,000.00.

Henderson Bridge Company First Mortgage, Central Trust Company of New York, Trustee—54 Wall Street, New York City—(Henderson Bridge, .47 miles).

Date of Mortgage, September 1, 1881; maturity, September 1, 1931. Total amount outstanding September 30, 1912, \$2,000,000.00.

Second Mortgage.

General Mortgage, Central Trust Company of New York, Trustee—54 Wall Street New York City. (Henderson to Kentucky-Tennessee State Line, 97.77 miles.)

66 Date of Mortgage, June 1, 1880; maturity, June 1, 1930. Total amount outstanding, September 30, 1912, \$4,726,000.00.

Unified 50-year Four per cent Gold Mortgage, Central Trust Company of New York, Trustee, 54 Wall Street, New York City. (On Henderson Bridge, .47 miles.)

Date of Mortgage, June 2, 1890; maturity, July 1, 1940. Total amount outstanding September 30, 1912, \$64,139,000.00.

Third Mortgage.

Unified 50-year four per cent Gold Mortgage, Central Trust Company of New York, Trustee, 54 Wall Street, New York City. (Henderson to Kentucky-Tennessee State Line, 97.77 miles.)

Date of Mortgage, June 2, 1890; maturity, July 1, 1940. Total amount outstanding September 30, 1912, \$64,139,000.00.

12. Paragraph 12, Morganfield Branch, Madisonville to Morganfield (Shown in the Petition as Madisonville & Providence Branch).

The property of this division is covered by the following mortgages:

First Mortgage.

Evansville, Henderson & Nashville Division First Mortgage, Central Trust Company of New York, Trustee, 54 Wall Street, New York City. (Madisonville towards Providence, Ky., 11 miles.)

Date of Mortgage, December 6, 1879; maturity, December 1, 1919. Total amount outstanding September 30, 1912, \$1,080,000.00.

Morganfield & Atlanta Railroad Company First Mortgage, Louisville & Nashville Railroad Company, Trustee. (Providence to Morganfield, Ky., 25.33 miles.)

Date of Mortgage, May 6, 1907; maturity, June 1, 1932. Total amount outstanding September 30, 1912, \$500,000.00.

General Mortgage, Central Trust Company of New York, Trustee, 54 Wall Street, New York City. (Extension to Providence, Ky., 5.10 miles.)

Date of Mortgage, June 1, 1880; maturity, June 1, 1930. Total amount outstanding September 30, 1912, \$4,726,000.00.

67

Second Mortgage.

General Mortgage, Central Trust Company of New York, Trustee, 54 Wall Street, New York City. (Madisonville towards Providence, Ky., 11 miles.)

Date of Mortgage, June 1, 1880; maturity June 1, 1930. Total amount outstanding September 30, 1912, \$4,726,000.00.

Unified 50-year four per cent Gold Mortgage, Central Trust Company of New York, Trustee, 54 Wall Street, New York City. (Extension to Providence, Ky., 5.10 miles.)

Date of Mortgage, June 2, 1890; maturity, July 1, 1940. Total amount outstanding September 30, 1912, \$64,139,000.00.

Third Mortgage.

Unified 50-year four per cent Gold Mortgage, Central Trust Company of New York, Trustee, 54 Wall Street, New York City. (Madisonville towards Providence, Ky., 11 miles.)

Date of Mortgage, June 2, 1890; maturity, July 1, 1940. Total amount outstanding September 30, 1912, \$64,139,000.00.

That portion of this railroad between Providence and Morganfield, 25.23 miles, is not owned by the defendant, although operated by it as a part of its system.

13. Paragraph 13, Kentucky Division—Covington to Corbin, Ky.—Knoxville Division—Corbin to Kentucky-Tennessee State Line, Pine Mountain Railroad—Savoy to Gatliff, Nevisdale to Packard, and Yingling to Chadman.

The property of these divisions is covered by the following mortgages:

First Mortgage.

Kentucky Central Railway First Mortgage, Metropolitan Trust Company of New York, Trustee, City of New York. (Covington to Richmond and Ft. Estill to Sinks, Ky., 146.68 miles.)

Date of Mortgage, July 1, 1887; maturity, July 1, 1987. Total amount outstanding September 30, 1912, \$6,742,000.00.

General Mortgage, Central Trust Company of New York, Trustee, 54 Wall Street, New York City. (Sinks to Livingston, Ky., 3.34 miles.)

68 Date of Mortgage, June 1, 1880; maturity, June 1, 1930. Total amount outstanding September 30, 1912, \$4,726,000.00.

Unified 50-year four per cent Gold Mortgage, Central Trust Company of New York, Trustee, 54 Wall Street, New York City. (Livingston, Ky., to Kentucky-Tennessee State Line, 61.20 miles.)

Date of Mortgage, June 2, 1890; maturity, July 1, 1940. Total amount outstanding September 30, 1912, \$64,139,000.00.

Second Mortgage.

Atlanta, Knoxville & Cincinnati Division four per cent Gold Mortgage, United States Trust Company of New York, Trustee, New York City. (Covington to Richmond and Ft. Estill to Sinks, and Livingston, Ky., to Kentucky-Tennessee State Line, 207.88 miles.)

Date of Mortgage, April 1, 1905; maturity, May 1, 1955. Total amount outstanding September 30, 1912, \$24,360,000.00.

Unified 50-year four per cent Gold Mortgage, Central Trust Company of New York, Trustee, 54 Wall Street, New York City. (Sinks to Livingston, Ky., 3.34 miles.)

Date of Mortgage, June 2, 1890; maturity, July 1, 1940. Total amount outstanding September 30, 1912, \$64,139,000.00.

Third Mortgage.

Atlanta, Knoxville & Cincinnati Division four per cent Gold Mortgage, United States Trust Company of New York, Trustee, New York City. (Sinks to Livingston, Ky., 3.34 miles.)

Date of Mortgage, April 1, 1905; maturity, May 1, 1955. Total amount outstanding September 30, 1912, \$24,360,000.00.

The property of the Pine Mountain Railroad Company is not mortgaged, and the road of that company is not owned by the defendant, although it operates the same as a part of its system.

14. Paragraph 14, Kentucky Division (Part of) Lexington to Paris (Shown in the Petition as Lexington & Paris Branch).

The property of this part of the Kentucky Division is covered by the following mortgages:

69

First Mortgage.

Kentucky Central Railway First Mortgage, Metropolitan Trust Company of New York, Trustee, City of New York.

Date of Mortgage, July 1, 1887; maturity, July 1, 1987. Total amount outstanding September 30, 1912, \$6,742,000.00.

Second Mortgage.

Atlanta, Knoxville & Cincinnati Division four per cent Gold Mortgage, United States Trust Company of New York, Trustee, New York City.

Date of Mortgage, April 1, 1905; maturity, May 1, 1955. Total amount outstanding September 30, 1912, \$24,360,000.00.

15. Paragraph 15, Kentucky Division (Part of) Maysville to Paris (Shown in the Petition as Paris & Maysville Branch).

This part of the Kentucky Division is covered by the following mortgages:

First Mortgage.

Kentucky Central Railway First Mortgage, Metropolitan Trust Company of New York, Trustee, City of New York.

Date of Mortgage, July 1, 1887; maturity, July 1, 1987. Total amount outstanding September 30, 1912, \$6,742,000.00.

Second Mortgage.

Atlanta, Knoxville & Cincinnati Division four per cent Gold Mortgage, United States Trust Company of New York, Trustee, New York City.

Date of Mortgage, April 1, 1905; maturity, May 1, 1955. Total amount outstanding September 30, 1912, \$24,360,000.00.

16. Paragraph 16, Kentucky Division (Part of) Richmond to Rowland.

This part of the Kentucky Division is covered by the following mortgages:

First Mortgage.

General Mortgage, Central Trust Company of New York, Trustee,
54 Wall Street, New York City.

70 Date of Mortgage, June 1, 1880; maturity, June 1, 1930.

Total amount outstanding September 30, 1912, \$4,726,000.00.

Second Mortgage.

Atlanta, Knoxville & Cincinnati Division four per cent Gold Mortgage, United States Trust Company of New York, Trustee, New York City. (Richmond to Fort Estill, Ky., 3.20 miles.)

Date of Mortgage, April 1, 1905; maturity, May 1, 1955. Total amount outstanding September 30, 1912, \$24,360,000.00.

17. Paragraph 17, Knoxville Division (Part of) Jellico to Halsey (Shown in the Petition as Halsey Branch).

This part of the Knoxville Division is covered by the following mortgages:

First Mortgage.

Unified 50-year Four per cent Gold Mortgage, Central Trust Company of New York, Trustee—54 Wall Street, New York City.

Date of Mortgage June 2, 1890; maturity July 1, 1940.

Total amount outstanding September 30, 1912, \$64,139,000.00.

Second Mortgage.

Atlanta, Knoxville & Cincinnati Division Four per cent Gold Mortgage, United States Trust Company of New York, Trustee—New York City.

Date of Mortgage April 1, 1905; maturity May 1, 1955.

Total amount outstanding September 30, 1912, \$24,360,000.00.

18. Paragraph 18.

It is not possible from the description in plaintiff's petition to determine what mileage of railroad is referred to in this paragraph, as Paragraphs 13, 17 and 31 of the petition appear to cover all of the railroad property in that locality.

19. Paragraph 19, Lebanon Branch, Lebanon Junction to Sinks

The property of this branch is covered by the following mortgages

71

First Mortgage.

General Mortgage, Central Trust Company of New York, Trustee
54 Wall Street, New York City.

Date of Mortgage June 1, 1880; maturity June 1, 1930.
Total amount outstanding September 30, 1912, \$4,726,000.00.

Second Mortgage.

Unified 50-year Four per cent Gold Mortgage, Central Trust Company of New York, Trustee, 54 Wall Street, New York City.

Date of Mortgage June 2, 1890; maturity July 1, 1940.
Total amount outstanding September 30, 1912, \$64,139,000.00.

20. Paragraph 20, Lexington Branch, Lagrange to Lexington.

The property of this branch is covered by the following mortgages:

First Mortgage.

The property of Louisville, Cincinnati & Lexington Railway General Mortgage, Mercantile Trust Company, Trustee, New York City.

Date of Mortgage November 1, 1881; maturity November 1, 1931.
Total amount outstanding September 30, 1912, \$3,258,000.00.

Second Mortgage.

Unified 50-year Four per cent Gold Mortgage Central Trust Company of New York, Trustee, 54 Wall Street, New York City.

Date of Mortgage June 2, 1890; maturity July 1, 1940.
Total amount outstanding September 30, 1912, \$64,139,000.00.

21. Paragraph 21, Lexington Branch (Part of) Shelbyville to Christiansburg (Shown in the Petition as Shelbyville Cut-off).

The property of this part of the Lexington Branch is covered by the following mortgage:

First Mortgage.

Unified 50-year Four per cent Gold Mortgage, Central Trust Company of New York, Trustee, 54 Wall Street, New York City.

Date of Mortgage June 2, 1890; maturity July 1, 1940.
72 Total amount outstanding September 30, 1912, \$64,139,000.00.

22. Paragraph 22, Memphis Line (Part of) Memphis Junction to Kentucky-Tennessee State Line.

The property of this part of the Memphis Line is covered by the following mortgages:

First Mortgage.

General Mortgage, Central Trust Company of New York, Trustee, 54 Wall Street, New York City.

Date of Mortgage June 1, 1880; maturity June 1, 1930.
Total amount outstanding September 30, 1912, \$4,726,000.00.

Second Mortgage.

Unified 50-year Four per cent Gold Mortgage Central Trust Company of New York, Trustee, 54 Wall Street, New York City.

Date of Mortgage June 2, 1890; maturity July 1, 1940.
Total amount outstanding September 30, 1912, \$64,139,000.00.

23. Paragraph 23, Owensboro & Nashville Division—Owensboro to Adairville.

The property of the Owensboro & Nashville Railway Company has never been conveyed to the defendant, although it is operated as a part of its system.

The property of this division is covered by the following mortgage:

First Mortgage.

Owensboro & Nashville Railway First Mortgage, Central Trust Company of New York, 54 Wall Street, New York City.

Date of Mortgage November 1, 1881; maturity November 1, 1931.
Total amount outstanding September 30, 1912, \$1,200,000.00.

24. Paragraph 24, Mud River Branch, Penrod to Mud River.

* The greater portion of this branch was taken up in 1910, for the reason that it had ceased to be a source of revenue.

25. Paragraph 25, Shelbyville Branch, Anchorage to Shelbyville

This property is not covered by mortgage.

73 26. Paragraph 26, Kentucky Highlands Railroad.

Chillicothe to Millville	6.46 miles;
Millville to Versailles	9.42 miles;

Louisville & Atlanta Division.*

Versailles to Beattyville Junction	100.11 miles;
Heidelberg to Idamay	3 miles.

First Mortgage.

Atlanta, Knoxville & Cincinnati Division, Four per cent Gold Mortgage, United States Trust Company of New York, Trustee, New York City.

(Versailles to Beattyville Junction, 100.11 miles, and Heidelberg to Idamay, Ky., 3 miles.)

Date of Mortgage April 1, 1905; maturity May 1, 1955.

Total amount outstanding September 30, 1912, \$24,360,000.00

The line Millville to Versailles (9.42 miles) was constructed under the charter of the Kentucky Highlands Railroad Company. This property is not bonded, unless it comes under the Kentucky Highlands Railroad Company Mortgage.

The line of the Kentucky Highlands Railroad Company, Cliffside to Millville, is covered by mortgage executed by the Kentucky Highlands Railroad Company to the Columbia Trust Company, Louisville, Ky., Trustee, dated July 1, 1907, authorizing \$500,000.00 of bonds, of which bonds for \$250,000.00 have been issued, due July 1, 1947, which are still outstanding and unpaid, bearing interest at the rate of five (5) per cent per annum, payable semi-annually.

27. Paragraph 27, Middlesborough Railroad (part of) Stony Fork to Ellwood, 8.95 miles (shown in the petition as Stony Fork Branch.)

The property of this part of the Middlesborough Railroad is covered by the following mortgage:

Unified 50-year Four per cent Gold Mortgage, Central Trust Company of New York, Trustee, 54 Wall Street, New York City.

Date of Mortgage June 2, 1890; maturity July 1, 1940.

Total amount outstanding September 30, 1912, \$64,139,000.00.

28. Paragraph 28, Pine Mountain Railroad Branch (as shown in the petition).

As heretofore stated, in reference to Paragraph 13, there is no mortgage covering the property of the Pine Mountain Railroad.

- 74 29. Paragraph 29, Madisonville, Hartford & Eastern Railroad.

There is no mortgage covering this property.

30. Paragraph 30, Wasioto & Black Mountain Railroad.

There is no mortgage on this railroad. It has never been conveyed to the defendant, although that portion which has been completed is now operated as a part of its system.

31. Paragraph 31, Knoxville Division (part of) Saxton to Ky.-Tenn. State Line—3.19 miles (shown in the petition as Jellico Branch).

It is not exactly clear whether this is the mileage referred to or not, but as it is the only mileage in that section not heretofore covered, presumably it is. The property of this part of the Knoxville Division is covered by the following mortgage:

First Mortgage.

Atlanta, Knoxville & Cincinnati Division Four per cent Gold Mortgage, United States Trust Company of New York, Trustees, New York City.

Date of Mortgage April 1, 1905; maturity May 1, 1955.

Total amount outstanding September 30, 1912, \$24,360,000.00.

32. Paragraph 32, Louisville Railway Transfer, East Louisville to South Louisville, 4.15 miles—(shown in the petition as Louisville Transfer Track).

This property is not covered by any mortgage

33. Paragraph 33, Paducah & Memphis Railroad.

This road is owned by the defendant, and was by it leased to the Nashville, Chattanooga & St. Louis Railway, a corporation organized and existing under the laws of the State of Tennessee, September 9, 1896, for a period of fifty (50) years from that date, and said lessee has been ever since that date, and is now, in possession, operation and control of said road, which extends from the City of Paducah, in the State of Kentucky, to the City of Memphis, in the State of Tennessee, that portion thereof situated in Kentucky being 49.40 miles in length.

The said Paducah & Memphis Railroad was at the institution of this suit, and is now, under mortgage as follows:

Paducah & Memphis Division 50-year Four per cent Gold First Mortgage.

- 75 Date of Mortgage, February 1, 1896; Maturity, February 1, 1946. Interest 4% payable, February 1st and August 1st. Amount authorized \$5,000,000.00.

Amount issued to September 30, 1912, \$4,836,000.00.

Trustee, Manhattan Trust Company of New York, No. 113 Broadway, New York.

The bonded debt per mile of road is \$19,024.00

The Kentucky proportion of said bonded debt is \$939,786.00.

The defendant states that said lessee is an indispensable, as well as necessary party defendant to this suit or any suit by plaintiff to condemn for a telegraph line any part of the right of way of said Paducah & Memphis Railroad, and defendant states said lessee can not be sued in this court and this court has no jurisdiction over said lessee herein, without its waiver, which it has not made; but, on the contrary, has objected to the jurisdiction over it herein, which objection this court has sustained and dismissed this suit as to said lessee.

The defendant files herewith as part hereof Exhibit E, which shows the mileage proportion of outstanding and unpaid bonds resting upon the various divisions and branches of the defendant's

system in Kentucky, referred to in the various numbered paragraphs of the plaintiff's petition.

The defendant states that each and all of said mortgagees or trustees in the mortgages resting upon the railroads aforesaid are directly and materially interested and claim an interest in the subject-matter of this action, and in this controversy adverse to the plaintiff and are necessary parties to a complete determination of the questions involved in this action.

The defendant, therefore, states that there is a defect of parties defendant to this action, which defect is not shown to exist by the plaintiff's petition, and the defendant objects thereto because of such defect and the failure of the plaintiff to make defendants, and by legal process bring before the court herein each and all of the above named mortgagees or trustees of the bondholders under liens of record on said railroads and railroad properties, portions of which the plaintiff seeks by this condemnation proceeding to take, injure and destroy, thus greatly diminishing the same in value, for its own uses and purposes, without giving them or either of them an opportunity to be heard in court, or to contest the claims asserted by the plaintiff herein, or the authority of the plaintiff to take, injure or destroy the property mortgaged to them as aforesaid, or the amount of the compensation or damages that shall be required to be paid by the plaintiff therefor.

The defendant states that the provision in the Act of March 19, 1898 (Section 4679-a, Kentucky Statutes, Subsection 9), declaring "that no notice of the condemnation proceedings herein provided for shall be given to any mortgagee of the defendant" is null and void, being in contravention of the due process clause of Section 1 of Article XIV of the Amendments to the Constitution of the United States, as well as of the provisions of the Constitution of the State of Kentucky.

Wherefore, having answered the plaintiff's petition, the defendant prays hence to be dismissed with its costs, and for all other proper relief.

HELM BRUCE,
CHARLES H. MOORMAN,
BENJAMIN D. WARFIELD,
ED. S. JOUETT,
HENRY L. STONE,

Attorneys for Defendant.

EXHIBIT "A" WITH ANSWER.

Statement Showing Miles of Wire Erected on Western Union Poles on L. & N. Right of Way in the State of Kentucky.

Divisions	Telegraph property of R. R. Co.	Telephone property of R. R. Co.	Signal property of R. R. Co.
Henderson	294.5	168.8	33.98
Owensboro & Nashville		71.7	
L. C. & L.	205.	229.4	176.49
Louisville Div. & Lebanon Branch	364.5	1,017.9	30.67
Memphis Line	100.		
Nashville	54		5.
Kentucky	311.1	535.6	16.34
Cumberland Valley	72.6	316.2	3.67
L. & A. R. R.			3.88
Knoxville	34.	136.	11.14
Louisville Terminals	4.	2.2	6.63
Total	1,439.7	2,477.8	277.80

Compiled in office of Supt. Telegraph, October 23, 1912.

EXHIBIT "B" WITH ANSWER.

Statement showing second or double tracks of Louisville & Nashville Railroad and divisions on which the same are located in Kentucky.

The mileage of second track at present in operation in the State of Kentucky aggregates 88.07, and is distributed as follows:

Main Stem 1st Division	29.70 miles
Main Stem 2d Division	4.38 "
Knoxville Division	.71 "
Cincinnati Division	12.52 "
Railway Transfer	4.15 "
"A" Street connection	.60 "
Kentucky Division	36.00 "
Total	88.07 miles.

In addition to this, there are now under construction on the Kentucky Division approximately 93.25 miles of second track.

EXHIBIT "C" WITH ANSWER.

This agreement, made this fifteenth day of December, 1909, by and between the American Telephone and Telegraph Company, party of the first part, and The Western Union Telegraph Company, party of second part, both parties being corporations organized and

existing under and by virtue of the laws of the State of New York, and acting for themselves and on behalf of their associated companies as hereinafter more fully set forth,

Witnesseth:

Whereas, the business of each party is distinct from that of the other except that electrical circuits over wires must be used in the business of each; and,

Whereas, both parties, directly and in connection with and through associated companies, own, operate and maintain extensive systems of pole lines, fixtures, conduits, wires, cables, buildings, offices, switchboards and other electrical apparatus and appliances, and need to make constant additions thereto to provide adequately for increasing business; and,

Whereas, wires and cables with the necessary poles, conduits and other fixtures comprise a large portion of the plant of each of the parties hereto, and the wires and cables of each party are used

78 exclusively in its own business, although under modern scientific methods they are in many cases available for use by both parties simultaneously; and,

Whereas, the use in common as far as practicable of the plant facilities of both parties will serve to increase the efficiency of the service, avoid unnecessary duplications of lines and wires and thereby reduce the charges for depreciation and the costs of maintenance and operation;

Now, therefore, in consideration of the premises, the parties hereto agree as follows:

First. That, as far as practicable, they will arrange for the joint occupancy and use of existing plant facilities and of additions hereafter made thereto so as to secure for each party the largest possible use of both plants and the most economical methods of construction, maintenance and operation, without interfering with the operation or use of its plant by the owner thereof for its own business and purposes.

Second. That this agreement shall include all plants owned directly by either party, or by companies associated with either party who may desire to participate and enter into suitable contracts therefor with the party hereto which is associated with them, and each party shall furnish to the other a duly certified schedule of such companies within ninety days after the execution of this agreement; provided that no company associated with either party shall have the benefit of this agreement without the consent in writing of the other party. Provided, further, that duly certified additions to this schedule may be made from time to time during the life of this agreement by either party, with the consent in writing of the other party, and companies so added shall thereafter come under this agreement as though included in the original schedule; provided, that each party hereto is to make all arrangements with the other party hereto for and on behalf of each of its own associated companies and is to be responsible to the other for such companies in every respect.

Third. No company shall put into use or continue in use on plant of any other company, any apparatus, device, current or method which will endanger the property or interfere with its use by such other.

Fourth. In all cases in which facilities are furnished under the terms of this contract, the company furnishing them shall be entitled to, and shall receive, reasonable compensation therefor. Any provision for compensation, including commissions, rentals, etc., shall, at the request in writing of either party, be subject to revision at intervals of not less than three years, and shall, when such request be made, be taken up promptly and readjusted in the manner provided in Article Fifth.

Each of the companies hereto, and each company brought under this agreement, shall, so far as practicable, furnish every other company with a statement on the last day of each month of all charges against it accruing under this agreement up to the last day of the month preceding; and such account shall be paid in full by the debtor company to the creditor company within thirty days thereafter; provided, that claims for errors or adjustments may be made within three months after the receipt of the account (notwithstanding the payment thereof), and such claims shall be settled by the method provided in Article Fifth.

Fifth. In view of the variety of conditions existing, and the changes which are constantly taking place, all details under this agreement shall be determined and arranged by two agents, one of whom shall be appointed by each party, subject to change at its pleasure, who shall, by such appointment, be fully authorized to act for it and its associated companies in all matters involved in carrying out this agreement; it being understood and agreed that all sub-contracts and arrangements made in pursuance of these articles shall be in writing and signed by the parties to be bound. When these agents disagree, they shall at once formulate in writing the point or points of disagreement and submit the same to their respective presidents. The presidents, personally, or by duly authorized representatives, one for each, shall promptly consider the point or points submitted, and if they agree, their decision shall be final. If they disagree, in whole or in part, the point or points of their disagreement shall be stated in writing, signed by both presidents, and submitted to a disinterested arbitrator, who shall be selected by the presidents, and whose decision shall be final. The expense of such arbitration shall be paid by the party against whom the arbitrator decides. If his decision is partly against one and partly against the other, the arbitrator shall direct the proportional distribution of the expenses.

Should the President or Executive Committee of either party disapprove, in whole or in part, any agreement made by its agent, notice in writing of such disapproval may be given to the other party at any time within six months of the date of such agreement, and the point or points so disapproved shall then be submitted to arbitration in the manner provided in this Article. In such cases, the arbitrator shall, in addition to the distribution of

the expense of the arbitration, determine what reimbursement, if any, shall be made to either party for actual expenditures made in good faith under such agreement.

Sixth. This contract shall not affect the liability of either of the parties, or their associated companies, for negligence of their officers, agents or employes, and each company shall hold every other company harmless for the acts, negligence and defaults of its own employes, without, however, affecting the mutual liability of the parties hereto as provided in the Second Article of this agreement.

Seventh. This agreement shall continue in force until December 31, 1934, and thereafter until terminated by one year's written notice from either party to the other.

Eighth. Upon the termination of this agreement the plants of both parties and their associated companies shall be rearranged so that each party and each associated company shall be left in peaceable possession of its own property, and all work in bringing this about shall be so carried on as to cause the least possible interference with or interruption to the service of either party or any of its associated companies.

So far as possible, plant used jointly shall be so reapportioned and segregated as to cause the minimum of loss, and all differences which may arise in regard thereto shall be settled by the method provided in Article Fifth.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents and their corporate seals affixed by their respective Secretaries, thereunto duly authorized, the day and year first above written.

[Seal A. T. & T. Co.]

AMERICAN TELEPHONE AND TELE-
GRAPH COMPANY,

By THEO. N. VAIL,
President.

ALFRED E. HOLCOMB,
Asst. Secretary.

E. J. H.
R. C. C.

[Seal T. W. U. T. Co.]

THE WESTERN UNION TELEGRAPH
COMPANY,

By R. C. CLOWRY,
President.

J. C. WILLEVER,
Secretary.

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EXHIBIT "D" WITH ANSWER.

List of Stations in the State of Kentucky Abandoned by the Western Union Telegraph Company.

	Oct. 21st.	Artemus,	Nov. 1st.
Adairville,	" "		
Allensville,	" "		
Anchorage,	" "		
Auburn,	" "		
Bloomfield,	" "	Bevier,	" "
Berry,	" "		
Brooks,	" "		
Buckner,	" "		
Bardstown Jet	" "		
Brodhead,	" "		
Berea,	" "		
Brush Creek,	" "		
Brumfield,	" "		
Clay,	" "	Christiansburg,	" "
Campbellsburg,	" "	Cleaton,	" "
Carlisle,	" "		
Crab Orchard	" "		
Crofton,	" "		
Corbin,	" "		
Colesburg,	" "		
Drakesboro,	" "		
Elizabethtown,	" 15th.	East Bernstadt,	" "
Elizabeth,	" 21st.	Emanuel,	" "
Eminence,	" "		
Elkton,	" "		
Earlington,	" "		
Franklin,	" "	Flat Lick,	" "
Ford,	" "		
Gracey,	" "	Grays,	" "
Guthrie,	" "	Greensburg,	" "
Glendale,	" "		
Hartford,	" "	Hazel Patch,	" "
Island,	" "		
Irvine,	" "		

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Junction City,	Oct. 21st.	Jett,	Nov. 1st.
Keene,	" "		
Lebanon,	" 15th.	Lily,	" "
Livermore Depot,	" 21st.	Livingston,	" "
La Grange,	" "	Lot,	" "
Lebanon Jet.,	" "		
Lewisburg,	" "		
Mt. Vernon,	" th.		
Morganfield,	" 21st.		
Morton's Gap,	" "		
Midway,	" "		
Millersburg,	" "		
Munfordville Depot	" "		
Miller's Creek,	" "		
Nortonville,	" "		
New Haven,	" "		
New Hope,	" "		
Providence,	" "	Pinecard,	" "
Pewee Valley,	" "	Pittsburg,	" "
Pembroke,	" "		
Panola,	" "		
Paint Lick,	" "		
Russellville,	" 15th.	Robards,	" "
Rice Station,	" 21st.	Rockhold,	" "
Rowland,	" "		
Red House,	" "		
Sebree,	" "	Shawhan,	" "
Slaughter's	" "	Silver Creek,	" "
St. Matthews,	" "		
Shelbyville,	" "		
Springfield,	" "		
Stanford,	" "		
Scottsville,	" "		
Shepardsville,	" "		
Saxton,	" "		
Sparta,	" "		
Sonora,	" "		

Taylorsville,	Oct.	21st.
Trenton,	"	"
Upton,	"	"
Valley View,	"	"
Worthville,	"	15th.
Woodburn,	"	21st.
Williamsburg,	"	"
Wildie,	"	"

Office of Supt. Telegraph, October 23rd.

Order Filing Demurrer to Answer.

Entered November 12, 1912.

This day came the parties by their respective attorneys. The plaintiff, the Western Union Telegraph Company, by its attorneys, filed its demurrers.

1. To the first paragraph of the answer of the defendant, Louisville & Nashville Railroad Company herein, because the same fails to state facts sufficient to constitute a defense to the cause of action set out in the petition.

2. To so much of said first paragraph as attempts to deny the Charter power of the plaintiff to obtain the relief prayed for in its petition.

3. To so much of said first paragraph as denies the right of the plaintiff to appropriate to its use the property set out and described in its petition.

4. To the whole of the tenth paragraph of said answer, because the same fails to state any facts sufficient to constitute a defense to the cause of action set out in the petition.

5. To the whole of the eleventh paragraph of said answer, because the same fails to state any facts sufficient to constitute a defense to the cause of action set out in the petition.

6. To so much of the said eleventh paragraph of said answer as controverts the right of the plaintiff to make a binding agreement as to the method under which it will use the property that shall be appropriated to its use in this proceeding.

7. To so much of said eleventh paragraph of said answer as relates to the use and manner of construction of the telegraph line of the plaintiff when erected upon the property appropriated in this proceeding; also to the allegations as to any interference by such construction with the ordinary travel and traffic of the defendant.

8. To the whole of the twelfth paragraph of said answer because the same fails to state any facts sufficient to constitute a defense to the cause of action set out in the petition.

9. To the first subparagraph of said paragraph 12, because the same fails to state any facts sufficient to constitute a defense to the cause of action set out in the petition.

10. To the second subparagraph of said paragraph 12, because the same fails to state any facts sufficient to constitute a defense to the cause of action set out in the petition.

11. To the third subparagraph of said paragraph 12, because the same fails to state any facts sufficient to constitute a defense
85 to the cause of action set out in the petition.

12. To the fourth subparagraph of said paragraph 12, because the same fails to state any facts sufficient to constitute a defense to the cause of action set out in the petition.

13. To the fifth subparagraph of said paragraph 12, because the same fails to state any facts sufficient to constitute a defense to the cause of action set out in the petition.

14. To the sixth subparagraph of said paragraph 12, because the same fails to state any facts sufficient to constitute a defense to the cause of action set out in the petition.

15. To the seventh subparagraph of said paragraph 12, because the same fails to state any facts sufficient to constitute a defense to the cause of action set out in the petition.

16. To the eighth subparagraph of said paragraph 12, because the same fails to state any facts sufficient to constitute a defense to the cause of action set out in the petition.

17. To subparagraph 8½ of said paragraph 12, because the same fails to state any facts sufficient to constitute a defense to the cause of action set out in the petition.

18. To the ninth subparagraph of said paragraph 12, because the same fails to state any facts sufficient to constitute a defense to the cause of action set out in the petition.

19. To the whole of the thirteenth paragraph of said answer, because the same fails to state any facts sufficient to constitute a defense to the cause of action set out in the petition.

20. To the whole of the fourteenth paragraph of said answer, because the same fails to state any facts sufficient to constitute a defense to the cause of action set out in the petition.

21. To the whole of the fifteenth paragraph of said answer because the same fails to state any facts sufficient to constitute a defense to the cause of action set out in the petition.

22. To the whole of the seventeenth paragraph of said answer except so much as denies the right of the plaintiff to appropriate to its use the property of the defendant on both sides of its track, because the same fails to state any facts sufficient to constitute a defense to the cause of action set out in the petition.

86 23. To the whole of the eighteenth paragraph of said answer because the same fails to state any facts sufficient to constitute a defense to the cause of action set out in the petition.

24. To the whole of the nineteenth paragraph of said answer because the same fails to state any facts sufficient to constitute a defense to the cause of action set out in the petition.

25. To the whole of the twentieth paragraph of said answer because the same fails to state any facts sufficient to constitute a defense to the cause of action set out in the petition.

26. To the whole of the twenty-first paragraph of said answer, because the same fails to state any facts sufficient to constitute a defense to the cause of action set out in the petition.

27. To the whole of the twenty-second paragraph of said answer, because the same fails to state any facts sufficient to constitute a defense to the cause of action set out in the petition.

This day came the plaintiff and filed herein copy of a contract executed on June 18, 1884, between the plaintiff and the defendant herein, and it is agreed that this is the same contract referred to in the 15th paragraph of the answer of the defendant.

It is ordered that the demurrers to the answer of the defendant, the Louisville & Nashville Railroad Company, be set for hearing December 3, 1912.

87 *Contract Between Plaintiff and Defendant, Executed June 18, 1884*

Filed by Plaintiff November 12, 1912, and Referred to in Paragraph 15 of Defendant's Answer.

This agreement made and entered into this eighteenth (18th) day of June, 1884, by and between the Louisville and Nashville Railroad Company, hereinafter designated as the Railroad Company, and the Western Union Telegraph Company, hereinafter designated as the Telegraph Company.

Witnesseth:

Whereas the operation of the Telegraph Company's lines along the various railroads owned, controlled or operated by the Railroad Company, has been conducted under the provisions of an agreement between the parties hereto, dated May 14, 1880, which agreement provides that it may be terminated on one year's written notice after July 1, 1885,

And whereas it is desirable that a new agreement should be entered into between the parties hereto.

Now, therefore, for and in consideration of the covenants and agreements herein contained, the parties hereto have mutually agreed as follows:

First. This contract is intended to cover, and shall embrace, all the railroad lines now owned, leased, controlled or operated by the Railroad Company which are as follows:

Those absolutely owned by the Railroad Company being:

Cincinnati Division, extending from Newport, Ky., to Louisville, Ky.

Lexington Branch, extending from Lagrange, Ky., to Lexington, Ky.

Louisville Division, extending from Louisville, Ky., to Nashville, Tenn., with branch from Bardstown Junction, Ky., to Bardstown, Ky.

Knoxville Division, extending from Lebanon Junction, Ky., to the Tennessee State line at Jellico, Ky.

Memphis line, extending from Edgefield Junction, Tenn., to Henderson, Ky., with branch from Madisonville, Ky., to Providence, Ky.

Pensacola Division, extending from Pensacola Junction, Ala., to Pensacola, Fla.

Pensacola & Selma (upper and lower) Divisions, extending respectively from Gulf Junction near Selma, Ala., to Pine Apple, Ala., and from Pensacola Junction, Ala., to Repton, Ala., and

New Orleans & Mobile Division, extending from Mobile, Ala., to New Orleans, La.

88 The lines leased by the Railroad Company being:

Shelby Railroad extending from Anchorage, Ky., to Shelbyville, Ky.

Northern Division of Cumberland & Ohio Railroad, extending from Shelbyville, Ky., to Bloomfield, Ky.

Southern Division of Cumberland & Ohio Railroad, extending from the junction, near Lebanon, Ky., to Greensburg, Ky.

Southeast & St. Louis Railway, extending from Evansville, Ind., to East St. Louis, Ill., with branches from McLeansboro, Ill., to Shawneetown, Ill., and from O'Fallon Junction, Ill., to O'Fallon, Ill.

Nashville & Decatur Railroad, extending from Nashville, Tenn., to Decatur, Ala.

Mobile & Montgomery Railway, extending from Mobile, Ala., to Montgomery, Ala., and

Selma Division of Western Railroad of Alabama, extending from Montgomery, Ala., to Selma, Ala.

The lines controlled by the Railroad Company being:

Nashville, Chattanooga & St. Louis Railroad, extending from Chattanooga, Tenn., to Hickman, Ky., and the various branches thereof.

South & North Alabama Railroad, extending from Decatur, Ala., to Montgomery, Ala., with a branch from Elmore, Ala., to Wetumpka, Ala.

Pontchartrain Railroad, extending from New Orleans, La., to Lake Pontchartrain, La.

Pensacola & Atlantic Railroad, extending from Pensacola, Fla., to River Junction, Fla.

Owensboro & Nashville Railroad, extending from Owensboro, Ky., to Adairville, Ky.

Nashville & Florence Railroad, extending from Columbia, Tenn., to Lawrenceburg, Tenn.

Glasgow Railroad, extending from Glasgow Junction, Ky., to Glasgow, Ky.

Birmingham Mineral Railroad, extending from

Louisville, Harrods Creek & Westport Railroad, extending from Louisville, Ky., to Prospect, Ky.

And this contract is also intended to cover, and it shall include, any branch or branches that may be constructed by the Railroad Company, or other railroad or railroads that may be acquired by it, either by lease or purchase, or that may be controlled or
89 operated by it during the existence of this agreement, should it be lawfully competent to include it or them.

Second. The Railroad Company, so far as it legally may, hereby grants and agrees to assure to the Telegraph Company, the exclusive right of way on and along the line, lands and bridges of all roads now owned, leased, controlled or operated by said Railroad Company, or which it may hereafter own, lease, control or operate, for the construction and use of such lines of poles and wires or underground wires for commercial or public uses or business as the Telegraph Company may require, together with the exclusive right to maintain offices in its depots for commercial telegraph business, and the Railroad Company will not transport men or material for the construction or operation of any line of poles and wire or wires or other lines in competition with the lines of said Telegraph Company party hereto, except at and for the Railroad Company's regular local tariff rates, nor will it furnish for such competing line or lines any facilities or assistance which it may lawfully withhold nor stop its trains, nor distribute material therefor at other than regular stations. Provided always, that in protecting and defending the exclusive grants conveyed by this contract, the Telegraph Company may use and proceed in the corporate name of the Railroad Company, but shall indemnify and save harmless the Railroad Company from any and all damages, costs, charges and legal expenses incurred therein or hereby.

Third. The Railroad Company agrees to transport free of charge over any and all of its roads, all officers and employes of the Telegraph Company, when traveling on the business of the said Company, and also to transport free of charge and distribute along its said roads at the points required, all poles, wire, insulators, brackets and all other material of the Telegraph Company, to be used in the construction, reconstruction, maintenance, repair and operation of its telegraph lines and wires on the said roads covered by this agreement, and all supplies and other material for the establishment and maintenance of the offices thereon; and the Railroad Company also agrees to transport free of charge all poles and other material for the use of said Telegraph Company on its lines beyond or off the roads covered by this agreement, to an amount computed at the

local freight charges of said Railroad Company, not exceeding one-half ($\frac{1}{2}$) of the amount of free telegraph service which the Telegraph Company may perform for the Railroad Company beyond the roads covered by this agreement, the tolls for said free telegraph service to be computed at the regular day rates of the Telegraph Company, between the points at which the messages of the Railroad Company may originate, and the points to which they may be destined. Settlements to be made at the end of each year.

All of such transportation shall be furnished by the Railroad Company with reasonable promptness, upon application of the superintendent or other officer of the Telegraph Company.

Fourth. The Railroad Company shall furnish on the request of the Superintendent or foreman of the Telegraph Company, all the unskilled labor necessary for the maintenance and ordinary current repairs of the Telegraph Company's lines of telegraph on said roads, such repairs to include the necessary renewal of poles, not to exceed an average of one new pole for every mile of road operated by the Railroad Company in any one year until the lines shall require reconstruction; but for general reconstruction and renewal of poles the Telegraph Company shall supply the labor, the Railroad Company furnishing transportation and distribution of material as aforesaid.

Fifth. The Telegraph Company agrees to furnish all material and the necessary line repairers for the maintenance, repair and reconstruction of its lines and wires along said railroads, and a competent foreman to direct the labor which the Railroad Company hereinbefore agrees to furnish. The Telegraph Company further agrees to furnish within six months after receipt of written notice from the Railroad Company, all labor and material, and to construct a line of telegraph on any road or branch now or hereafter owned, leased, controlled or operated by the Railroad Company on which there may be no line of telegraph. The Telegraph Company further agrees to furnish instruments and local batteries and material to maintain said batteries and blank forms and stationery for commercial business, for the establishment, maintenance and operation of the telegraph offices on and along said railroads. The Telegraph Company will also furnish the use of its main batteries for the successful operation of its wires along said railroads, including the wires set apart for the use of the Railroad Company.

Sixth. At all telegraph stations of the Railroad Company, except at its depots or stations located at terminal points where the telegraph company maintains separate offices, the Railroad Company's employees, acting as agents of the Telegraph Company, shall receive, transmit and deliver promptly such commercial or public messages as may be offered at the tariff rates of said Telegraph Company, and shall render to said Company monthly statements of such business and full accounts of all receipts therefrom, and the Railroad Company shall pay to said Telegraph

Company at such time and in such manner as it may direct, all of such receipts at said offices, after deducting ten (10) per centum of the cash receipts at said offices on business with points on the Telegraph Company's lines, it being agreed that the Railroad Company may retain said ten (10) per centum as compensation for the services of its employees in the transaction of and accounting for said commercial telegraph business; but the Railroad Company shall not retain any portion of tolls on cable messages or tolls belonging to lines of other companies. The Railroad Company's employees shall not, without the consent of said Telegraph Company, transmit, over said telegraph lines any free messages except those herein provided for, and concerning all telegraph business, whether paid or free, shall conform to all rules and regulations of said Telegraph Company applicable thereto, Provided, said railroad employees shall be entitled to make special deliveries at the cost of the addressee at greater distances than one-half of a mile from the offices.

Seventh. Either party to this agreement may establish and maintain offices at such places on the line of said roads as it shall deem expedient; and if said Telegraph Company elects to establish an office at a station of said Railroad Company, then the Railroad Company, if it has room to do so, shall furnish suitable accommodations in such station free of rent; and if at any station one person can attend to the telegraph business of both parties, the Telegraph Company's operator shall do the telegraph business of the Railroad Company as its agent and without charge; and said operator at such station shall be subject to the directions of the Chief Operator of the Railroad Company, so far as railroad business is concerned.

Whenever the number of paid and collect messages including repeated messages, sent from any railroad office, exceeds four thousand (4,000) in any one year, the Telegraph Company shall provide an operator for such office, and said operator shall as hereinbefore provided, do the telegraph business of the Railroad Company as its agent and without charge.

92 Whenever the telegraph business of both parties hereto at any office of the Telegraph Company in a railroad depot becomes so large that more than one operator is needed to do such business of both parties, then the Railroad Company will employ and pay its own operator.

Eighth. It is a condition of this contract that the Railroad Company is not to be responsible for, and the Telegraph Company hereby covenants and agrees to save the Railroad Company harmless and indemnifying it against any loss or damages of any kind arising from any injury to persons in the employ of or property belonging to the Telegraph Company, while being carried free over said roads under this agreement, or from any neglect or failure in the transmission or delivery of messages for any person doing business with the Telegraph Company or on account of any other public telegraph business; and the Telegraph Company shall not be responsible for, and the Railroad Company agrees to indemnify and save harmless the Telegraph Company against any loss or damages of

any kind arising from or on account of any error or failure in the transmission or delivery of messages sent for the Railroad Company under this agreement. And the Railroad Company is not to be responsible for, and the Telegraph Company covenants and agrees to save it harmless and indemnify it against any loss or damages of any kind, including costs and attorney's fees incident to or resulting from any injury to persons growing out of the position or condition of any of the telegraph poles, wires or other property of the Telegraph Company along said railroad lines.

Ninth. One wire shall be set apart for the preferential use of the Railroad Company along the entire length of all the roads, except along branch roads where only one wire is maintained and on such wires along said branch roads the important business only of the Railroad Company relating to the movement of its trains, accidents and damage to road shall have precedence; otherwise the business of both parties hereto shall have equal facilities thereon. And it is further agreed that if the Railroad Company should at any time require greater wire facilities on any portion of its road than are herein provided, the Telegraph Company will furnish an additional wire at the cost price thereof upon its poles, or the Railroad Company may at its own cost string said additional wire upon the Telegraph Company's poles in such manner and position as it may direct. Upon the wires thus set apart for the preferential use of the Railroad Company, its business messages and the family and social messages of its officers and agents may be sent free between all points on its roads; but all other business except that which is ordered to be sent free by the Telegraph Company shall be charged for and the proceeds thereof shall be remitted as hereinbefore provided.

Tenth. The Telegraph Company agrees to issue to such officers and agents of the Railroad Company, as may be designated by the President, Vice President or General Manager thereof, annual franks, authorizing the free transmission of messages relating strictly to the railroad or corporate business of the Railroad Company, originating at or destined to all points on the Telegraph Company's lines in the United States, including points on the Railroad Company's railroads. Said franks may be used for the transmission of such messages of the Railroad Company between the principal cities on the line and at the terminal of its roads; but it is understood and agreed that the Railroad Company shall as far as practicable, transmit its business between all places reached by its roads over the wires herein set apart for railroad business.

Eleventh. It is mutually understood and agreed, that the telegraph lines and wires covered by this contract shall form part of the general system of the Telegraph Company, and as such, in the department of commercial or public telegraph business, shall be controlled and regulated by it, the Telegraph Company fixing and determining all tariffs for the transmission of messages and all connections with other lines.

The Railroad Company further agrees that its employes shall transmit all commercial telegraph business offered at its offices over the lines of the Telegraph Company party hereto, and shall account to the Telegraph Company exclusively for all such business and the receipts thereon, as provided herein.

No employe of the Railroad Company shall, while in its service, be employed by any other Telegraph Company, than the Telegraph Company party hereto.

Twelfth. The provisions of this agreement shall supersede said agreement hereinbefore mentioned and all other agreements between the parties hereto or their respective predecessors in ownership or control of their respective properties; and the provisions of this agreement shall be and continue in force for and during the term of twenty-five (25) years from and after the first (1st) day of July, eighteen hundred and eighty-four (1884), and thereafter

94 until the expiration of one (1) year after written notice shall have been given by one of the parties hereto to the other of a desire or intention to terminate the same; and in case of any disagreement concerning the true intent and meaning of any of said provisions, the subject of such difference shall be referred to three arbitrators one to be chosen by each party hereto, and the third by the two others chosen, and the decision of such arbitrators, or of a majority thereof, shall be final and conclusive. Provided, that should the lease or control of any railroad now held by the Railroad Company terminate before the expiration of the twenty-five years hereinbefore specified, this contract shall not cover such railroad after the termination of such lease or control, unless the same should be renewed within the said term of twenty-five years, or unless the owner or lessee of such railroad shall ratify this agreement, and should the Railroad Company, cease from any cause to own any railroad or branch herein mentioned, this contract shall continue to apply to such railroad or branch if the Telegraph Company shall so elect, the Railroad Company agreeing that, it will require the purchaser or lessee thereof to accept the obligations and benefits of this agreement, if the Telegraph Company shall elect to continue to apply this agreement to such road.

Provided, However, and it is hereby expressly stipulated and agreed, that if any of the provisions of this agreement shall be found unusually burdensome or oppressive to either party, such party, after having given ninety (90) days' written notice to the other, may propose such amendments or changes to this agreement as it may deem just and equitable and consistent with the general tenor of this agreement. In case the parties hereto shall not be able to agree upon such proposed amendments or changes, the same shall be referred to and settled by arbitrators in the manner hereinbefore provided, it being understood and agreed that the powers of such arbitrators shall not extend to making either wholly or substantially a new contract, but simply to the relief of either party from any provisions complained of, which experience under the agreement shall have proved to be inequitable, and the operation

of which may not now be foreseen by the parties hereto. The decision of such arbitrators shall be binding upon the parties hereto and shall thereafter stand as a part of this agreement without further act of the parties unless modified or amended by some future decision of arbitration as herein provided.

In witness whereof the parties to these presents have caused their corporate names, by the hands of their proper officers, to be hereunto subscribed, and their corporate seals affixed and attested, the day and year first above written

(Signed)

THE LOUISVILLE & NASHVILLE
RAILROAD COMPANY,

By M. H. SMITH, [SEAL.]
President.

R. K. WARREN,
Asst. Secretary.

THE WESTERN UNION TELE-
GRAPH COMPANY,

By JNO. VAN HORNE, [SEAL.]
Vice President.

A. R. BREWER,
Secretary.

Order of Submission on Demurrers to Answer.

Entered December 3, 1912.

This day came the plaintiff, the Western Union Telegraph Company, by A. P. Humphrey and Richards & Harris, its attorneys. Came also the defendant, the Louisville & Nashville Railroad Company by H. L. Stone, Helm Bruce and Jas. B. Wright, its attorneys. This case coming on to be heard upon the plaintiff's demurrers to the answer of the defendant, and having been argued by counsel and the court not being sufficiently advised thereof takes time.

Opinion on Demurrers to Answer.

Filed December 17, 1912.

The plaintiff by its petition seeks to condemn certain property for its uses. The defendant has filed its answer containing 22 paragraphs, and the plaintiff has demurred to certain of those paragraphs.

The right of the plaintiff to condemn the property of the defendant to its uses upon the payment of just compensation is based upon the Act of the General Assembly of Kentucky approved March 19, 1898, which has been compiled in the Kentucky Statutes as Section 4679a. It has been and is insisted by the defendant that this Act is violative of the Constitution of the United States and of the Constitution of Kentucky, but we have been unable to see (and so

said in determining the defendant's demurrer to the petition) how it violates either of them. We think the Legislature of Kentucky had power to regulate the exercise of the right of eminent domain in this State, and that it legitimately exercised that power in the legislation referred to.

It is insisted also that the plaintiff, which is a New York corporation, has not shown itself to possess sufficient authority under the laws of that State to call into exercise the powers of the State of Kentucky for the purpose indicated in the petition. We can not agree that the Statute of Kentucky is not broad enough to embrace a telegraph company with the powers given to the plaintiff by the State of New York, and this conclusion is emphasized in its application to this case by the recognition of the plaintiff as a corporation by the defendant which has had large dealings with the plaintiff over a period of more than 25 years. Besides the failure by the plaintiff to perform any condition subsequent exacted by the New York Statute does not, per se, avoid its powers, however much it might, at the option of the State of New York, be subjected to quo warranto proceedings. The State of New York might complain of the failure, if any, of the defendant to perform the condition subsequent referred to in the argument, or at its option it might condone the fault, but it does not under the circumstances of this case appear to lie in the mouth of the defendant to complain of any failure of that sort, especially in view of its long course of dealings with the plaintiff on a contrary basis. See 1st Clark and Marshall on Corporations, Section 72.

What is commonly called the practice Act, now Section 914 of the Revised Statutes of the United States, requires us in actions at law to conform as near as may be to the practice, forms and modes of procedure used in the State Courts, and while the Kentucky Act gives original jurisdiction to county courts, this court can not be a county court, but the diverse citizenship of the parties and the amount in controversy confer jurisdiction upon this court to enforce the right given by the Act. While enforcing this right we must conform as near as may be to the practice in the State Courts in similar cases.

Starting out with the distinct recognition of the fundamental proposition that the State of Kentucky (except as to property needed by the United States for governmental purposes) has the supreme and exclusive right to say how and by whom the right to condemn land for public purposes may be exercised, and that the uses provided for by the Act of 1898 have, in the judgment and by the will of the State, been determined to be public uses, we see nothing to do in this suit except to adhere steadily to the dominant proposition that we are to ascertain the cash market value of the property the plaintiff wants to take and the actual damages that will accrue to the defendant in the diminution of the remainder of its right of way. Other questions must be altogether subordinate. This situation is not unusual. It is practically and in all essential respects the same in all condemnation suits. The plaintiff in its pleading states what property is desired for its uses, and the only question left is what will be

just compensation under all the circumstances for what is to be taken.

This brief general statement as to the things to be steadily borne in mind brings us to the special defenses set up in the various paragraphs of the defendant's answer so far as they are called in question by the plaintiff's demurrer. The answer is extraordinarily long considering the questions of fact involved. Some parts of it are entirely argumentative, and to that extent violative of the Code of Practice and of the rules of good pleading.

Par. 1.

Paragraph 1 consists largely of denials of fact, and to that extent is manifestly sufficient in law. One of the denials, however, is as to the powers and rights of the plaintiff under the laws of the State of New York and another denial is as to the right of the plaintiff under a specified Act of Congress. Of all of these laws the court takes judicial notice. So far as there are denials of legal propositions the paragraph is not important as matter of pleading, and while we hold that the plaintiff's powers under New York legislation are ample and

98 can not be questioned by the defendant, and while we think the Act of Congress referred to is not, for the present at least, material to this case, we think the general demurrer to this paragraph should be overruled, leaving it open to the plaintiff to move to strike out matters conceived to be immaterial. There is no such practice authorized by the Kentucky Code as a demurrer to an isolated part of a single paragraph. *Sun Mutual Life Ins. Co. v. Crist*, 19 Ky. Law Rep. 307, expressly so rules.

Par. 10.

Certain parts of Paragraph 10 contain denials of fact which demand that the general demurrer to the paragraph should be overruled. However, certain clauses of this paragraph deny certain legal propositions, and to that extent the pleading is faulty. Of course at any state of the case those matters would be disregarded as a statement of fact, though the legal proposition propounded might have to be decided by the court.

Par. 11.

While some legal conclusions rather than questions of fact may be involved in this paragraph, we think the legal phases of it can be taken care of by the court at the trial. The issues of fact made can be attended to by the jury. The general demurrer to the paragraph must be overruled.

Par. 12.

Paragraph 12 pleads legal propositions only in an elaborately argumentative way, but it does not in any of its parts state facts as distinguished from propositions of law. What the paragraph states may be good enough argument to be addressed to the court, but not a statement of facts to be inquired of by a jury. Under the Kentucky

Code the pleadings must state facts and not arguments or conclusions of law. The paragraph is, therefore, peculiarly open to demurrer. It would be remarkable if the averments it contains as to the law may be controverted in plaintiff's reply or be taken as true for failure to controvert. Still more remarkable would it be if, after a denial by the plaintiff, proof upon the legal propositions should be submitted to the jury in order to ascertain which side is right. This will illustrate what is in the mind of the court. The demurrer to this paragraph is sustained.

It may be well, however, to add that in the view of the court, as heretofore expressed on a demurrer to the petition, Section 248 of the State Constitution refers to juries "in civil and misdemeanor" cases only, while Section 242 refers to cases like this.

There would seem to be no difficulty as to the character of jury that is to be empaneled.

Par. 13.

The court is in some doubt as to what should be done with the general demurrer to Paragraph 13 of the answer, but has concluded to overrule it, although in doing so it by no means intends to intimate that it yields to the defendant's contention that the defendant has the first right to choose what part of its right of way shall be taken by the plaintiff or a right to any preference in respect to what it may itself intend hereafter to use for its own telegraph or telephone lines. Our view rather is that no such right or preference exists. The last clause of Section 1 of the Act does not seem to confer any rights upon the defendant as to a non-existing telegraph line. The peculiar conditions actually existing in this instance greatly emphasize the view we take. Indeed there would seem to be no justice in allowing the defendant to exclude the plaintiff from keeping its own poles where they now are when the right of way it has had, and which it desires to hold, shall be fully paid for through this action. The party seeking to condemn appears to be given the right to take what it "desires" though this, of course, is subject to the other provisions of the Act. That is the object of the suit. The statute does not require that its right to take shall be made subordinate to any purpose of the owner. The important thing is giving the owner compensation for what in fact is taken. The taking of one particular part of a thing may involve greater compensation including greater damages, but it does not otherwise affect or control the right to take what the plaintiff desires. It is largely because this paragraph may show certain things which possibly may more or less affect compensation that we overrule the demurrer to it.

Par. 14.

The 14th paragraph seems only to plead legal propositions and not facts, and the demurrer to it should be sustained. The Act of 1898 gives express and ample guidance to the court, and its provisions must govern, notwithstanding a pleading such as Paragraph 14 of the answer.

Par. 15.

The 15th paragraph, while it may state facts which might constitute a cause of action in defendant's favor against the plaintiff
100 (were it not for the provisions of the contract between the parties of date June 18, 1884, referred to in this paragraph, and which seems to make all the poles, wires, etc., referred to therein the property of the plaintiff), what is alleged in it does not constitute any defense to the plaintiff's cause of action against the defendant. We think the averments of this paragraph do not constitute a defense of any sort and consequently the demurrer to it must be sustained. While taking this action we by no means forget Section 5 of the Act of 1898, which provides elaborately as to what facts may be shown in evidence at the trial.

Par. 17, 18, 19, 20, 21, and 22.

The State of Kentucky has legislated upon the question of the grant of power to the plaintiff to condemn property in this State for its uses, and has made no exception or condition which has any relation to the matters set up in the 17, 18, 19, 20, 21, and 22 paragraphs of the answer. The averments made in them, even if true, are therefore immaterial, or at all events ineffectual to bar the proceeding. We think the plaintiff may exercise all the powers fairly within the meaning of the Act, and we see nothing in either of these paragraphs which shows anything to the contrary. As to the rights of the mortgagees of the defendant or of its property they are abundantly protected by Section 9 of the Act. The demurrer to each of these paragraphs is sustained.

WALTER EVANS,
Judge.

December 17, 1912.

Order on Demurrers to Answer.

Entered December 17, 1912.

The parties came by their counsel of record, and the court being now sufficiently advised of the questions arising upon the demurrer of the plaintiff to the defendant's answer, delivered its opinion
101 in writing, which is filed, and in accordance therewith it is considered and adjudged that the said demurrer should be, and it is, overruled as to the 1st, 10th, the 11th and the 13th paragraphs of the said defendant's answer, to which ruling of the court and to each of said paragraphs separately, the plaintiff excepts. It is further considered and adjudged by the court that the said demurrer should be, and it is, sustained to the 12th, the 14th, the 15th, the 17th, the 18th, the 19th, the 20th, the 21st and the 22d paragraphs of the defendant's answer, to which ruling of the court as to each of said

paragraphs separately, the defendant excepts, and is given leave within ten days to amend its said answer if so advised.

Order Filing Amended Answer.

Entered December 28, 1912.

This day came the defendant, the Louisville & Nashville Railroad Company, by Henry L. Stone, its attorney, and filed its amended answer herein.

102

Amended Answer.

Filed December 28, 1912.

Second Paragraph Omitted.

1.

The defendant, Louisville & Nashville Railroad Company, by way of amendment to the fifteenth paragraph of its original answer, states that since the filing of its original answer on the 2d day of November, 1912, the period fixed by defendant in its written notice to plaintiff dated August 5, 1912, for the removal by plaintiff of the poles, wires, cross-arms, batteries, instruments, fixtures and appliances constituting the telegraph line operated and maintained by plaintiff on defendant's railroad rights of way in Kentucky and other States, from said rights of way, and for the vacating by plaintiff of the defendant's said premises as set out in said paragraph of its original answer, has expired, and during said period the plaintiff failed and refused to remove said poles, wires, cross-arms, batteries, instruments, fixtures and appliances, or any part thereof, from defendant's said rights of way in Kentucky, except the instruments in and at the offices in this State, and cut out its telegraph service, as set forth in Exhibit D filed with and made part of the nineteenth paragraph of defendant's original answer, leaving, on December 1, 1912, and ever since that date, all the poles, wires, cross-arms and the remainder of said batteries, instruments, fixtures and appliances composing said telegraph line upon defendant's said rights of way and premises aforesaid, which the plaintiff failed and refused to vacate, and still fails and refuses to vacate, as it was notified in writing as aforesaid to do, prior to December 1, 1912. The defendant, therefore, states by reason of plaintiff's said failure and refusal to remove said poles, wires, cross-arms, batteries, instruments, appliances and other fixtures (except the instruments to the extent above stated) from the leased premises after the expiration of the term prescribed in the contract of June 18, 1884, terminated by the notice in writing given by plaintiff in accordance with the terms of that contract, and after the expiration of the period fixed in defendant's said written notice of August 5, 1912, to-wit, on November 30, 1912, which was a reasonable period within which to make said removal, and by reason of plaintiff's failure and refusal to va-

cate said premises by the expiration of said period, that all of the poles, wires, cross-arms, batteries, instruments, appliances and other fixtures in and composing said telegraph line still remaining on defendant's said premises and railroad rights of way in Kentucky as well as in other States, on and since December 1, 1912, passed to and became the property of the defendant,

103 in accordance with the terms, conditions and provisions of defendant's said notice to plaintiff dated August 5, 1912, particularly Paragraph 8 thereof, with the right on the part of the defendant to hold, use, operate, maintain or otherwise dispose of the same as its own property, and to refuse to longer permit the plaintiff to remove or use the same in any manner or for any purpose, and in addition to said property which thus passed to, and since November 30, 1912, has belonged to, and now belongs to, the defendant as its own telegraph line on its own railroad rights of way in Kentucky and the other States, where its railroads are situated and operated, were and are all the telegraph, telephone and signal wires, together with the attachments, fixtures and appliances thereof, strung at defendant's own cost and expense upon said poles and cross-arms, and heretofore and now used by defendant exclusively in the conduct and operation of its own railroad business. The defendant, therefore, states that the plaintiff, since November 30, 1912, has not owned or been entitled to operate or maintain upon defendant's rights of way or premises in Kentucky, or in any of said other States, the said telegraph line heretofore constructed, operated and maintained thereon, nor has the plaintiff any power, right or authority, without defendant's consent, to continue to occupy, as it seeks by this proceeding to do, with said telegraph line, the rights of way or structures of the defendant, or to maintain or operate said telegraph line where now placed or located, or elsewhere on defendant's premises or rights of way in Kentucky or any of said other States, or to condemn any part of defendant's railroad rights of way in Kentucky or any of said other States for the purpose of continuing, as it seeks to do herein, the operation and maintenance of said telegraph line for its uses and purposes, as set forth in its petition, on or along the present location of said telegraph line or elsewhere on defendant's said rights of way or structures, or any part thereof.

The defendant further states that the plaintiff does not seek by its petition to condemn a right of way over or along defendant's rights of way or structures in Kentucky upon which to construct or erect a new or different telegraph line from that already constructed and in operation thereon, which, since November 30, 1912, has been, and is now, the property of the defendant, as hereinabove set out, and the same is constantly being used exclusively by defendant by the operation of the telegraph, telephone and signal wires
104 strung upon the poles and cross-arms of said line, at its own cost and expense, for the operation and movement of its engines and trains and the transaction of its railroad business.

The defendant states that since the said telegraph line on its rights of way and structures ceased on November 30, 1912, to be the plaintiff's and became the defendant's, no necessity whatever exists for the condemnation of any part of defendant's railroad rights of way or

structures in Kentucky, or any of said other States, for a telegraph line by plaintiff; and such condemnation for a telegraph line by plaintiff upon the location of said old telegraph line is located, operated and maintained, and the building of a new telegraph line thereon and the operation and maintenance of the same by plaintiff would, necessarily and inevitably, obstruct and interfere with the said present line which has become the property of the defendant, as well as the ordinary travel and traffic and the business of the defendant, resulting in irreparable injury and damage to defendant and the public it serves, in violation of the provisions of the Act of Congress of July 24, 1866, referred to in defendant's original answer, and of the provisions of the Act of the Legislature of Kentucky of March 19, 1898, also referred to in its original answer, were the latter Act valid for any purpose.

The defendant further states that the Board of Directors of the defendant on November 14, 1912, by a preamble and resolution then adopted, a copy of which, duly certified by its Secretary under the official seal of the defendant, is filed herewith as part hereof, marked Exhibit F, ratified, approved and confirmed the action of the defendant's President in giving for and on behalf of defendant the said written notice to the plaintiff dated August 5, 1912, to remove the poles, wires, cross-arms, fixtures, etc., from the defendant's rights of way and premises prior to December 1, 1912, and also authorized, empowered and directed the defendant's President to carry out the provisions of Paragraph 8 of said written notice in the exercise of his judgment and discretion, and as he might be advised by defendant's general counsel.

The defendant further states that the defendant's Board of Directors on November 14, 1912, by a preamble and resolutions then adopted, a copy of which, duly certified by its Secretary under the official seal of the defendant, is filed herewith as part hereof, marked

Exhibit G, authorized, empowered and directed defendant's
105 President to proceed to construct on, over and along the rights of way of the defendant's railroads throughout its system, both main and branch lines, within such time and in such manner as he may deem necessary and proper, and to extend the defendant's telephone wires and system for the conduct and transaction of its railroad business economically, safely and efficiently upon and in accordance with the location theretofore made and selected for such line (which was done prior to the institution of this condemnation suit), with the power to construct, put in operation and maintain such telephone line, using in the construction thereof the poles, wires, fixtures, etc., as may be used and operated for telegraph purposes, as might hereafter be determined upon by the Board of Directors of the defendant; and the defendant's President was further directed by said resolutions to begin with such divisions or between such points on defendant's system as he might select or deem to stand most in need of such telephone service, and to prosecute said work of construction with reasonable dispatch until completed.

The defendant further states that by said resolutions the defendant's Board of Directors ratified, approved and confirmed the acts of the Executive and Engineering Departments of the defendant

in making and selecting the location for defendant's own telephone or telegraph line, as well as signal line, over defendant's rights of way, and defendant's President was thereby empowered, authorized and directed also to extend and install on, over and along the rights of way of the defendant on all main line divisions, approximately twenty-five hundred (2,500) miles or more, within such time and in such manner as he may deem necessary and proper, the electric automatic block signal system, using, if practicable and suitable for that purpose, the same poles on which defendant's telephone wires may be strung, or a separate line of poles wherever the same may be necessary for safe and efficient service, and in the extension and construction of such signal line he was directed to begin on those divisions or between those points which he might select or deem most in need of such lines, and to prosecute said work of construction, extension and installation with reasonable dispatch until completed.

The defendant states that it is the purpose and intention of the defendant, in pursuance of the said authority and power conferred upon its President to proceed at once with the work of constructing,

106 putting in operation and maintenance of its said telephone and signal lines on, over and along its rights of way in Kentucky and said other States, at the place and on that portion of its rights of way where such line was located prior to the bringing of this suit by plaintiff, which is at substantially the same place and on the same location on defendant's said rights of way where the present telegraph line located thereon, operated by plaintiff, is situated, and where plaintiff is seeking to condemn the right to continue to operate and maintain the present telegraph line; and defendant states that in the establishment of its own line as aforesaid, it will use and operate as its own the line of poles already on its said rights of way in so far as it may be entitled to do so and find the same suitable and proper for such purpose.

Wherefore, the defendant prays as in its original answer, that the plaintiff's petition be dismissed at its costs, and for all other proper relief.

HELEN BRUCE,
CHAS. H. MOORMAN,
ED. S. JOUETT,
HENRY L. STONE,

Attorneys for Defendant.

EXHIBIT F WITH AMENDED ANSWER.

Extracts from the Record of the Proceedings of the called meeting of the Board of Directors of the Louisville & Nashville Railroad Company held at the office of the Company, No. 71 Broadway, in the City and State of New York, on Thursday, November 14, 1912, at 2 o'clock P. M.

Present:

Mr. Henry Walters, Chairman;
Mr. M. H. Smith, President;

Mr. August Belmont;
Mr. Warren Delano;
Mr. Alexander Hamilton;
Mr. Michael Jenkins;
Mr. D. P. Kingsley;
Mr. G. M. Lane;
Mr. W. G. Oakman;
Mr. Edward W. Sheldon;
Mr. John I. Waterbury.

On motion, duly seconded, the following preamble and resolution were adopted:

107 Whereas, under the advice of the general counsel, the President addressed to the Western Union Telegraph Company of New York, a written notice dated August 5, 1912, signed by him, as President for and on behalf of this Company, and attested by the Secretary with the official seal of this Company affixed thereto, and caused the same to be delivered to the Manager of said Telegraph Company at Louisville, Ky., on said date, and to the President thereof in New York on or about August 7, 1912, in words and figures as follows, to-wit:

"Louisville & Nashville Railroad Company.

President's Office, Louisville, Ky.

Milton H. Smith, President.

August 5, 1912.

To the Western Union Telegraph Company of New York:

1 You are hereby notified by the undersigned, Louisville & Nashville Railroad Company, that on and after August 17, 1912, the use and occupation by you of its railroad rights of way, or any part thereof, situated in the States of Kentucky, Ohio, Indiana, Illinois, Missouri, Tennessee, Virginia, North Carolina, Georgia, Alabama, Florida, Mississippi, and Louisiana, and of its buildings, offices, stations and premises, or any part thereof, as and for a telegraph line composed of poles, cross-arms, wires, batteries, instruments, appliances and other fixtures will be without its permission and against its will and consent.

2. You are hereby further notified to vacate its said railroad rights of way, buildings, offices, stations, and premises, and to commence in good faith, to remove therefrom immediately after August 17, 1912 and not later than September 1, 1912, all and singular the said poles, cross-arms, wires, batteries, instruments, appliances and other fixtures composing your said telegraph line now and heretofore erected/operated and maintained by you under the provisions of the written contract dated June 18, 1884, between you and the undersigned company, which you, by your written notice dated August

11, 1911, and received by the undersigned company August 17, 1911, voluntarily terminated upon the expiration of one year thereafter, to-wit, on August 17, 1912.

3. You are hereby further notified and required to diligently and continuously prosecute said work of removal from its commencement as aforesaid, and to complete the same prior to December 1, 1912; and to enable you to do so within the period stated, the undersigned company hereby offers and undertakes to furnish all
108 necessary and suitable engines and cars for that purpose, such cars to be loaded by your employees at and between stations on each of its several lines or divisions of railroad in said States, at such points thereon and at such times as may be reasonably designated by you in writing, delivered, with proper shipping directions, to its General Manager, the undersigned company being afforded a reasonable opportunity to detach and remove its own wires, fixtures, etc., on such poles, and to keep out of your way in said work of removal on your part; and the undersigned company further offers and undertakes to transport the said poles, cross-arms, wires, batteries, instruments, appliances and other fixtures thus loaded at its regular legal rates to destinations, if on its own lines, and if not, then to deliver the same to its connecting lines, as in the case of the carriage of like commodities and materials for other shippers.

4. You are hereby further notified that in the meantime, and before you shall have effected such removal as aforesaid, all services rendered by you for or to the undersigned company, its officers, agents or employees, in the transmission of messages on or in the conduct of its business by telegraph over your wires in said telegraph line, or any portion thereof, or over any other telegraph line owned and operated by you, and in the receipt and delivery of such messages will be paid for by the undersigned company in cash or at the end of each month during said period between August 17th and December 1, 1912, at your regular legal rates and charges for like services rendered to other patrons; that between the dates last named the undersigned company will accept for furnishing office room and operators to transact your commercial business at points where you do not maintain a separate office, 25% of the receipts for messages received and forwarded to one of your offices, or received from one of your offices and delivered to addressee, and 50% of the receipts when received and delivered by the agent of the undersigned company until your said telegraph line connecting therewith shall have been removed as aforesaid, but, in no event, longer than November 30, 1912; that the undersigned company will also, in like manner, pay you the reasonable value of the use of your wires as it may continue to use along its said line of railroad, and in cities and towns along the same or at the termini thereof after August 17, 1912, and prior to December 1, 1912, and for the use, if any, of the instruments, main and local batteries, terminal facilities, testing service, etc., for
109 the operation of such wires as the undersigned company owns on said poles, as well as for such other services as you may perform for it between the dates last named.

5. You are hereby further notified that, for all transportation and other services rendered by the undersigned company to or for you or your officers, agents, or employes, after August 17, 1912, the undersigned company's regular legal rates and charges will be charged and collected from you in cash or at the end of each month during the period aforesaid.

6. You are hereby further notified that all officers, agents and employes of the undersigned company to whom you have issued franks for the current year, by which their messages over your telegraph lines on or for the conduct of the business of the undersigned company will be instructed to return to you such franks on or prior to August 17, 1912; and you are hereby requested to instruct all of your officers, agents and employes to whom the undersigned company has issued passes for the current year over its lines, or any of them, to return such passes to its General Manager on or prior to the last named date.

7. You are hereby further notified that for your continued use and occupation, as and for a telegraph line, of the undersigned company's said right of way, buildings, offices, stations and premises, or any part thereof, in said States, or either of them, after August 17, 1912, and prior to December 1, 1912, you will be held liable and required to pay to the undersigned company the full value thereof, as well as all damages it shall sustain by reason or on account of being prevented from erecting, operating and maintaining its own telegraph or telephone line where the same has been located on its said rights of way, and by reason and on account of such use and occupation of its said rights of way and premises by you against its will and consent, and wrongfully and without right after the termination of said existing contract.

8. You are hereby further notified that in default of your vacating the undersigned company's said rights of way and premises, or in the event of your failure or refusal to remove therefrom your poles, cross-arms, wires, batteries, instruments, appliances and other fixtures aforesaid, or any part thereof, prior to December 1, 1912, as in this notice hereinabove set forth, then and in that event the undersigned company will take possession, appropriate and use all and singular the said poles, cross-arms, wires, batteries, instruments, appliances and other fixtures, or so much thereof as may, on or after the last named date, be or remain on the undersigned company's
110 said rights of way or premises in all or either of said States, and hold, use, operate, maintain or otherwise dispose of the same as its own property, and refuse to longer permit you to remove or use the same in any manner or for any purpose, and will use all legitimate means in its power to prevent you from interfering with its possession, use and ownership thereof.

9. You are hereby further notified that inasmuch as the undersigned company can not erect its own telegraph or telephone line where the same has been located on its said right of way while your

telegraph line is there operated and maintained, the undersigned company will by necessity be compelled to make use of your existing telegraph poles and wires thereon for the transmission of messages in the conduct of its railroad business until your said line is removed therefrom as hereinabove set forth, you will understand that such compulsory use of your poles and wires is not and must not be construed to be an acquiescence by the undersigned company in your continuance upon or continued use and occupation of its said rights of way.

In witness whereof, the Louisville & Nashville Railroad Company has hereunto caused its name to be subscribed by M. H. Smith, its President, and its official seal to be affixed by J. H. Ellis, its Secretary, this the date first above written.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY.

By M. H. SMITH,

President.

Attest:

[SEAL.] J. H. ELLIS,

Secretary.

Now, therefore, be it

Resolved, That the action of the President in giving the notice aforesaid to the said Telegraph Company be, and the same is hereby, ratified, approved and confirmed; and the President is hereby authorized, empowered and directed, in default of the said Telegraph Company vacating this Company's rights of way, buildings, offices, stations and premises, or any part thereof, or in case of its failure or refusal to remove therefrom its poles, cross-arms, wires, batteries, instruments, appliances and other fixtures, or any part thereof, prior to December 1, 1912, to carry out the provisions of Paragraph Eight (8) of said notice, in the exercise of his judgment and discretion, and as he may be advised by the general counsel.

I, J. H. Ellis, Secretary of the Louisville & Nashville Railroad Company, hereby certify that the foregoing extract is a true and correct copy as taken from the record of the proceedings of the Board of Directors of said Company at the time and place stated in the caption thereof.

Witness my hand and the official seal of said Company hereto affixed this 19th day of November, 1912.

J. H. ELLIS,

Secretary.

[SEAL.]

EXHIBIT G WITH AMENDED ANSWER.

Extracts from the Record of the Proceedings of the Called Meeting of the Board of Directors of the Louisville & Nashville Railroad Company, Held at the Office of the Company, No. 71 Broadway, in the City and State of New York, on Thursday, November 14, 1912, at 2 o'clock p. m.

Present:

Mr. Henry Walters, Chairman;
Mr. M. H. Smith, President;
Mr. August Belmont;
Mr. Warren Delano;
Mr. Alexander Hamilton;
Mr. Michael Jenkins,
Mr. D. P. Kingsley;
Mr. G. M. Lane;
Mr. W. G. Oakman;
Mr. Edward W. Sheldon;
Mr. John I. Waterbury.

On motion, duly seconded, the following preamble and resolutions were adopted:

Whereas, the First Vice-President in January, 1912, gave instructions to the Fourth Vice-President to proceed immediately to cause to be selected and located on, over and along the rights of way of all divisions of this Company's system a telegraph or telephone line in order to handle this Company's business after the termination of the contract between this Company and the Western Union Telegraph Company of New York; and,

Whereas, in pursuance of such instructions the Fourth Vice-President instructed and directed the Chief Engineer to proceed at once to select and make the location for such telegraph or telephone line of poles and wires on, over and along this Company's railroad rights of way, and under the supervision and direction of the Chief Engineer and his Assistant Engineers, aided by the Chief Operator or Superintendent of Telegraph, a location on, over and along such rights of way for this Company's telegraph or telephone line of poles and wires was thereafter, from time to time, made and selected, and upon going over and examining the rights of way on each division throughout this Company's entire system, laid down and described by lines upon blue prints of each mile thereof, now on file in the Chief Engineer's office, on which location the line of poles and wires of the telegraph line of the Western Union Telegraph Company of New York was constructed and is still situated, and follows and occupies in all substantial and material respects the same location and position on this Company's rights of way as the telegraph line of the latter Company; and,

Whereas, the President after a conference with the Chairman

of this Board, in October, 1912, gave instructions to the Fourth Vice-President to proceed to assemble material and to construct a pole line between Evansville, Indiana, and East St. Louis, Illinois, suitable for carrying telephone wires to be placed thereon, and in locating the poles to consult the Signal Engineer so as to facilitate the attachment of electric automatic block signals in the most advantageous manner:

Now, therefore, be it

Resolved, That the acts and instructions aforesaid of the First and Fourth Vice-Presidents, and the location made and selected on, over and along this Company's rights of way by the Engineer's Department on all divisions of this Company's system in all the States where its railroad lines owned or leased and operated are situated, and in the instructions aforesaid of the President to the Fourth Vice-President, be, and the same are hereby, ratified, approved and confirmed.

Resolved, further, That the President be, and he is hereby, authorized, empowered and directed, within such time and in such manner as he may deem necessary and proper, to extend this Company's telephone wires and system for the conduct and transaction of its railroad business economically, safely, and efficiently on, over and along the rights of way of all its divisions, upon and in accordance with the location made and selected as aforesaid for such line, with

proper power to construct, put in operation, and maintain such
113 telephone line, using in the construction thereof poles, wires, fixtures, etc., as may be used and operated for telegraph purposes, as may hereafter be determined upon by this Board. He shall begin with such divisions or between such points on this Company's system as he may select or which may be deemed to stand in most need of such telephone service, and prosecute said work of construction with reasonable dispatch until finished.

Resolved, further, That the President be, and he is hereby, authorized, empowered and directed to extend and install on, over and along the rights of way of all main line divisions of this Company, approximating twenty-five hundred (2,500) miles or more, within such time and in such manner as he may deem necessary and proper the electric automatic block signal system, using, if practicable and suitable for that purpose, the same poles on which this Company's telephone wires may be strung, or a separate line of poles wherever the same may be necessary for safe and efficient service, and in the extension and construction of such signal line he shall begin on those divisions or between those points which he may select or deem most in need of such line, and prosecute said work of extension, construction and installation with reasonable dispatch until completed.

I, J. H. Ellis, Secretary of the Louisville & Nashville Railroad Company, hereby certify that the foregoing extract is a true and correct copy as taken from the record of the proceedings of the Board of Directors of said Company at the time and place stated in the caption thereof.

Witness my hand and the official seal of said Company hereat affixed this 19th day of November, 1912.

[SEAL.]

J. H. ELLIS,
Secretary.

114 *Order Filing Reply, Demurrer to Amended Answer, and Motion to Strike from First Paragraph of Answer.*

Entered January 4, 1913.

This day came the parties by their attorneys. The plaintiff by its attorneys filed its reply to the 13th paragraph of defendant's answer, also its demurrer to the 1st and 2d paragraphs of defendant's amended answer. The plaintiff moves the court to strike from the 1st paragraph of the answer of the defendant each and every part of the following words, which are upon the first page thereof:

"The defendant denies that the plaintiff under its charter or the laws of New York, has power to own, construct, operate or maintain lines of electric telegraph or to acquire by purchase or otherwise property for the extension, construction, operation and maintenance of lines of electric telegraph in all the States of the United States, or in the State of Kentucky, except to the City of Louisville through Covington, Georgetown and Frankfort, including a branch circuit to Lexington, in that State, or to acquire by purchase or otherwise without the consent of the defendant a right of way over the rights of way owned by said defendant on or over which its lines of railroad are located and operated in the State of Kentucky."

Also each and every part of the following language in said first paragraph on page 2 thereof:

"But the defendant denies that the plaintiff has any lawful power or authority to continue or to acquire by condemnation proceedings or otherwise, without the consent of this defendant, such right of way and structures or any part thereof, or to maintain or operate its said line of telegraph where now placed or located, or hereafter constructed, or subject to such changes and location of such right of way as the necessities of the plaintiff or the defendant may require."

115 *Reply of Plaintiff to the Thirteenth Paragraph of the Answer.*

Filed January 4, 1913.

The plaintiff denies that since August 17, 1912, it has been necessary for the defendant to have or operate any telegraph or telephone line, or signal line, established upon the rights of way of its railroad, other than the telegraph, telephone and signal lines now situate thereon upon the poles of the plaintiff, or that it has been so necessary in order that it might either safely, conveniently, promptly, successfully or efficiently conduct or carry on its business as a common carrier by railroad; denies that defendant has any business as

a common carrier by either telegraph, or telephone; denies that prior to the institution of this suit the defendant had located its telegraph or telephone line to be constructed, or which it intends to construct on its said right of way in this State; and it has no knowledge or information sufficient to form a belief that the defendant will ever establish, erect or place in operation, or intends to establish, erect or place in operation any telegraph or telephone line on the same side of its rights of way where the plaintiff's poles and wires are now located.

Plaintiff denies that taking the defendant's rights of way throughout the State of Kentucky, the side of the right of way whereon plaintiff's poles and wires are erected, is the best, most convenient or suitable location for any contemplated line of the defendant's telegraph, telephone, or signal line, or that except in a very few places negligible in distance, the side of the right of way upon which plaintiff's poles and wires are located is the best, or most convenient, or suitable. It denies that there are other than a very few places where a line of poles and wires can not be suitably and conveniently located on each side of the right of way, and it denies that at these places poles and wires for two lines can not be suitably and conveniently located on the same side of the right of way; denies that taking the rights of way throughout in the State of Kentucky, the cost of construction, operation and maintenance of a line of telegraph and telephone poles erected upon the same side as that upon which the poles and wires of the plaintiff are situated, would be cheaper or more economical for the defendant; and it denies that the defendant has any preferential right to location, or that it is entitled to locate, establish, operate or maintain its own telegraph or telephone or signal lines for the conduct of its railroad business as well as its commercial business, as a common carrier of messages, news, etc., for hire
116 upon the location now sought by plaintiff to be condemned.

Plaintiff denies that any telegraph wires now upon the poles of this plaintiff located on the right of way of defendant's railroads in this State belong to the defendant; and plaintiff denies that by establishing its own telegraph, telephone and signal line for the conduct of its business, on the same side of the rights of way in this State where plaintiff's line is now located, the defendant can, with less expense for labor and material, or at a saving of money, detach its wires and fixtures from the poles of the plaintiff and attach them ready for use upon defendant's own poles.

Plaintiff denies that the continued maintenance and operation by plaintiff of its lines of poles and wires for telegraph purposes as now located will prevent the defendant, if it elects so to do, from erecting a line of poles and wires for telegraph, telephone and signal purposes on the same side of the right of way where are now located the poles and wires of the plaintiff; denies that such new line can not be so erected by the defendant without being interfered with by the poles and wires of the plaintiff, either mechanically or electrically; or that such erection with the continued operation and maintenance of plaintiff's wires and poles will endanger the correct or safe operation or movement of plaintiff's trains, or endanger the lives of its employes or passengers, or occasion loss or damage to its freight and

other traffic; and plaintiff denies that any location made by the defendant of a telegraph or telephone or signal line upon its rights of way in this State prior to or since the institution of this action, follows in either substantial or material respects the course and location on the same side of its rights of way as the existing telegraph line on said rights of way operated by plaintiff; denies that there has been any location of either telegraph or telephone or signal lines by the defendant upon the same side of its right of way as that whereon plaintiff's poles and wires are now located; and it denies that if this plaintiff is allowed to continue its use and occupation permanently, as it herein seeks to do, that such use and occupancy will greatly, or at all, obstruct, interfere with, damage or destroy defendant's use, occupancy or control of its own property or impair the value thereof, or interfere with the safe or efficient operation or maintenance of its roadbed and tracks for railroad business and purposes, or with the defendant's own telegraph, telephone or
 117 signal wires used or to be used by it in the necessary movement and operation of its engines and trains, or in serving the public in its capacity as a common carrier by railroad, telegraph or telephone; denies that the defendant is engaged in any business as a common carrier by telegraph or telephone.

Wherefore, plaintiff prays as in its petition

HUMPHREY, MIDDLETON & HUMPHREY,
 RICHARDS & HARRIS,

Attorneys for Plaintiff.

Demurrer to Amended Answer.

Filed January 4, 1913.

The plaintiff demurs to the amended answer of the defendant filed herein, on the following grounds:

First. It demurs to the first paragraph of said amended answer, which purports to amend the fifteenth paragraph of the original answer, because the same does not state facts sufficient to constitute a defense to plaintiff's cause of action.

Second. Plaintiff demurs to the second paragraph of said amended answer because the same does not state facts sufficient to constitute a defense to plaintiff's cause of action.

HUMPHREY, MIDDLETON & HUMPHREY,
 REY.

RICHARDS & HARRIS,

Attorneys for Plaintiff.

118 *Opinion on Demurrer to Amended Answer and Motions to Strike Out Parts of Original Answer.*

Filed January 27, 1913.

This case now comes before us upon the plaintiff's demurrer to each of the two paragraphs of the amended answer filed December

28, 1912, and also upon the motion of the plaintiff to strike out two specified parts of the defendant's original answer.

The Demurrer.

In the first paragraph of the amended answer, in substance, it is averred that the contract between the parties had theretofore been terminated; that as the result of that fact all the poles, wires and other equipment on defendant's right of way put there by the plaintiff became defendant's property, and that thereafter the plaintiff did not own or have the right to operate or maintain its telegraph line, nor any right without defendant's consent to continue to occupy defendant's right of way or any structures thereon. It is also averred that the plaintiff does not seek to condemn property for a new line different from that which by reason of the termination of the contract, had become the property of the defendant; that since that change of ownership no necessity exists for the condemnation of any part of the defendant's right of way or structures in Kentucky, and that a new line constructed by plaintiff upon the site of the old one would obstruct and interfere with the present line which had become the property of defendant, and which it uses for the conduct of its business, and also would be violative of the Act of Congress of July 24, 1866, and of the Act of the General Assembly of Kentucky, of March 19, 1898. It is also averred that defendant's Board of Directors has confirmed the action of its President in giving the notice to plaintiff to remove its poles and other structures from the right of way of defendant, and has directed the President to construct a telegraph system over its right of way with all reasonable dispatch, and that it is defendant's purpose to carry those plans into effect by constructing and putting into operation and maintenance such telegraph line at the place and on the portion of its right of way where such line was located prior to the bringing of this suit by the plaintiff, which is where the present line is located and operated by plaintiff, and where plaintiff is seeking to condemn the right to continue and

119 maintain the present telegraph line, and that the defendant will use and operate as its own the line of poles already there as far as it deems best.

The defense thus set up in this paragraph is fundamentally based upon the proposition of law, that at the termination, on November 30, 1912, of the contract theretofore existing between the parties the superstructure, poles, wires, apparatus, etc., which had been put upon the line by plaintiff during the continuation of the contract became at once the property of the defendant because it was not removed from defendant's land, and that such being the legal result, and as the defendant desires to use this property for its own purposes and for constructing its own telegraph line largely with the property that it had gotten from the plaintiff by its being permitted to remain where it was, the plaintiff has no right to condemn the right of way at that place, and, therefore, that no necessity exists for condemning any part of defendant's right of way for plaintiff's uses.

If the soundness of the legal proposition thus advanced in the pleading is equal to its ingenuity, there is no escape from the con-

clusion desired by the defendant. In its essence this proposition has heretofore been discussed and decided by the court when it was presented in a somewhat different form. A reconsideration of it has brought the same conclusion heretofore announced, namely, that the defendant did not acquire title to the plaintiff's property on the right of way by reason of any of the facts stated in the amended pleading. This conclusion must be emphasized by the fact that with great promptness the plaintiff began its efforts to condemn for its uses the property described in its petition under the provisions of what is now Section 4679a of the Kentucky Statutes.

2. The second paragraph of the amended answer, at considerable length and in full detail, sets forth in *hac verba* the laws of the State of New York under which the plaintiff was organized, and by which its powers are conferred and its duties fixed. It is then alleged that plaintiff had not performed certain acts nor done certain things which those laws required it to do subsequent to its organization. It is then said:

120 "The defendant pleads and relies on the plaintiff's said non-compliance with the laws of the State of New York and its want of power and authority thereunder or its charter or articles of incorporation and organization to acquire, own, operate or maintain a telegraph line in Kentucky (except from Covington to Louisville via Georgetown and Frankfort, with a branch line or circuit to Lexington, as hereinabove set forth), and especially its lack of power to acquire by condemnation proceedings the property of defendant or any portion of defendant's rights of way in Kentucky, without the consent of the defendant, for the continued operation and maintenance of a telegraph line, in bar of this proceeding, except as aforesaid."

The acts of omission which the answer sets forth respected duties of the plaintiff to the State of New York alone, and on this point the case is brought directly within the general principle that only the State which created the corporation can call it to account for such omissions, and that the corporation can not elsewhere be called in question respecting them. This principle has been clearly stated in *I Clark & Marshall on Corporations*, Section 72, and it has been authoritatively announced in many cases, particularly in *Chicago v. Blair*, 201 U. S. 400.

The demurrer to each paragraph of the amended answer must be sustained.

The Motion to Strike Out.

In considering the first of the motions to strike out certain parts of the defendant's original answer, we observe that the plaintiff in its petition alleges that the Western Union Telegraph Company is a corporation chartered and duly organized under the laws of the State of New York, with the authority to sue and be sued, contract and be contracted with, and with power to own, construct, operate and maintain lines of electric telegraph, and engage in the business of trans-

mitting by wire dispatches, messages, news, intelligence, etc. This is a formal but proper statement. These formal statements are formally denied, and then defendant proceeds also to deny what is not alleged, namely, that plaintiff has the power "to acquire by purchase or otherwise, without the consent of the defendant, a right of way over the right of way owned by defendant on or over which its lines of railroad are located and operated in the State of Kentucky." The

121 parts of the answer just copied only deny a legal proposition, the determination of which must be made to depend upon other considerations and not upon this denial of its existence. To the extent that the defendant has denied what is stated in the petition, the motion to strike out will be overruled, but that part of the matter above quoted will be stricken out.

As to the second part of the matter moved to be stricken out, it is obvious that there is a mere denial of a proposition of law. This part of the pleading may be good argument, but it is not what our Code of Practice regards as the statement or the denial of a "fact." The motion as to this part of the answer must be sustained.

Orders accordingly may be entered.

January 27, 1913.

WALTER EVANS,

Judge.

Order Ruling on Demurrers and Motions to Strike.

Entered January 27, 1913.

This day came the parties by their counsel of record, and the court being now sufficiently advised of the questions arising on the demurrer of the plaintiff to each paragraph of the defendant's amended answer, filed herein on December 28, 1912, and also of the questions arising on plaintiff's motion to strike out of the defendant's original answer two certain parts thereof specified and set forth in said motion, delivered its opinion thereof in writing, which is filed, and made part of the record, and pursuant thereto it is ordered and adjudged by the court.

First, that the demurrer to the first paragraph of the amended answer should be, and it is, sustained, to which the defendant excepts;

122 Second, that the demurrer to the second paragraph of the defendant's amended answer should be, and it is, sustained, to which the defendant excepts;

Third, that the first of the plaintiff's motions to strike out parts of the defendant's original answer should be overruled, except to the following extent, to-wit: That the following words should be, and they are, stricken out of said answer, namely: "or to acquire by purchase or otherwise, without the consent of the defendant, a right of way over the rights of way owned by said defendant on or over which the lines of railroad are located and operated in the State of Kentucky," to which ruling of the court the defendant excepts; and,

Fourth, that the second of said motions should be, and it is, sustained, and the following words are stricken out of said answer, namely:

"But the defendant denies that the plaintiff has any lawful power or authority to continue or to acquire by condemnation proceedings or otherwise, without the consent of this defendant, such right of way and structures, or any part thereof, or to maintain or operate its said line of telegraph where now placed or located, or hereafter constructed or subject to such change and location of such right of way as the necessities of the plaintiff or defendant may require."

To which the defendant excepts.

123 *Order Filing Amended Petition; Motion to Strike Part Thereof.*

Entered March 10, 1913.

This day came the parties by their respective attorneys. The plaintiff by its attorneys tendered an amended petition herein and moved the court to file same, to which the defendant objects, and the court being advised, it is considered, ordered and adjudged that said objection be overruled, and said amended petition is accordingly filed, to which the defendant excepts. Came the defendant and moves the court to strike out of the plaintiff's amended petition the following words, to-wit:

"And if the defendant will indicate which side it prefers to reserve, then the plaintiff will only ask for easement for its line of poles and wires upon the other side."

and the court not being advised, takes time.

Amended Petition.

Filed March 10, 1913.

Plaintiff, by leave of court, amends its petition and says, that the poles mentioned in its petition for which it desires the easement average thirty-two poles to the mile, with an average distance of one hundred and sixty-six feet apart.

It further says that it only desires the easement upon one side of the defendant's right of way for the distance of 108.50 miles, where it is alleged in the petition that it has a line of poles and wires upon both sides of the defendant's tracks, and if the defendant will indicate which side it prefers to reserve, then the plaintiff will only ask for easement for its line of poles and wires upon the other side.

A. P. HUMPHREY AND
RICHARDS & HARRIS,
Attorneys for Complainant.

124

Motion to Strike Part of Amended Petition.

Entered March 10, 1913.

The defendant moves the court to strike out of the plaintiff's amended petition the following words, to-wit:

"And if the defendant will indicate which side it prefers to reserve, then the plaintiff will only ask for easement for its line of poles and wires upon the other side,"

because the same is surplusage, redundant and irrelevant.

HELM BRUCE,
ED. S. JOUETT,
CHARLES H. MOORMAN,
HENRY L. STONE,

Attys. for Deft.

Order Filing Opinion and Overruling Motion to Strike Parts of Amended Petition.

Entered March 11, 1913.

This day came the parties by their attorneys. The court being now sufficiently advised of defendant's motion to strike out certain parts of plaintiff's amended petition filed herein March 10, 1913, delivered an opinion in writing which is filed, and pursuant thereto, it is considered, ordered and adjudged that said motion be, and it is, hereby overruled, to which the defendant excepts.

125

Opinion on Motion to Strike Out.

Filed March 11, 1913.

The plaintiff was permitted to file an amended petition on March 10, 1913, because it possibly might facilitate matters if the defendant should indicate which side of its railway track on its right of way it would prefer that plaintiff should locate its line if it should be located at all.

The defendant, after the amendment was filed, moved the court to strike out of it the following words, viz.: "And if the defendant will indicate which side it prefers to reserve, then the plaintiff will only ask for an easement for its line of poles and wires upon the other side." In addition to its motion to strike out, the defendant avowed its purpose to be not to make any statement of its preference in the premises. We think this avowal was within the defendant's rights, and that neither the court nor the plaintiff can compel the defendant to do otherwise. But it does not follow that the motion to strike out need be sustained. The plaintiff had the right to call on the defendant to indicate its preference in the premises, and, as we have stated, the defendant had the right to decline to do so.

The result probably is to leave the plaintiff's petition somewhat indefinite as to what it seeks to condemn at the points described in the amended petition. The defendant's motion will be overruled and the plaintiff may have leave to amend its petition so as fully and clearly to show the property it seeks to condemn along that part of the defendant's right of way described in the amended petition. The court has been unable to see how the matter has been important except to the extent indicated, and, with the plaintiff's petition amended so as to show precisely what it seeks to condemn, this phase of the subject will probably cease to be of any force or importance so far as the pleadings go.

An order overruling the motion to strike out will be entered.
March 11, 1913.

WALTER EVANS,
Judge.

126 *Order Filing Amended Petition, Answer to Amended Petition, Motion to Dismiss Petition, and Impaneling Jury.*

Entered March 12, 1913.

This day came the parties by their attorneys. The plaintiff by its attorneys filed an amended petition herein, and the defendant filed an answer to the amended petition filed herein March 10, 1913.

Came again the defendant and moved the court to dismiss the proceedings and the petition of the plaintiff upon written grounds which are filed, and the court being sufficiently advised of said motion overrules same, to which the defendant excepts.

Thereupon came a jury, to-wit, Wm. J. Sauer, John F. Ecker, W. E. Hess, Edward H. Clark, Alf. Taylor, J. J. Nuckols, Jas. H. Albert, G. W. Luckett, Ernest C. Adolph, Wm. O. Farman, John Frank and Wm. L. McPhetters, who were selected, tried and sworn to well and truly try the issue joined. The evidence was heard in part and there not being time to conclude same today, time is given until tomorrow morning at 9:30 o'clock.

It is ordered that the jury be adjourned until tomorrow morning at 9:30 o'clock.

Amended Petition.

Filed March 12, 1913.

The complainant, by leave of court, amends its petition by dismissing so much thereof as seeks to condemn an easement along the easterly side of the defendant's right of way for a distance of 108.50 miles, along which it has a line of poles and wires on both sides of the defendant's right of way, as described in its original petition.

Wherefore, plaintiff prays for all proper relief.

A. P. HUMPHREY AND
RICHARDS & HARRIS,
Attorneys for Complainant.

127

Answer to Amended Petition.

Filed March 12, 1913.

The defendant, Louisville & Nashville Railroad Company, for answer to the Amended Petition filed herein on March 10, 1913, denies that the poles mentioned in plaintiff's petition for which it desires the easement, or now on defendant's right of way, used and occupied by plaintiff, average only 32 poles to the mile, or have an average distance of as much as one hundred and sixty-six feet apart.

HELM BRUCE,
ED. S. JOUETT,
CHAS. H. MOORMAN,
HENRY L. STONE,

Attorneys for Defendant.

Order Filing Amended Petition.

Entered March 20, 1913

This day came again the parties by their attorneys. Came also the jury pursuant to order of adjournment. The plaintiff by its attorneys tendered an Amended Petition herein and moved the court to file same, to the filing of which the defendant objects, and the court being advised, overrules said objection and orders said Amended Petition filed, to which the defendant excepts. The evidence was further heard, and there not being time to conclude same today, time is given until tomorrow.

It is ordered that the jury be adjourned until tomorrow morning at 9:30 o'clock.

128

Amended Petition.

Filed March 20, 1913.

Plaintiff, by leave of court, amends its petition by striking therefrom the following words: "of the Telegraph Company, or" where such words appear therein on page 2*b* as part of the following sentence: "subject to such changes in location of such right of way as the necessities of the Telegraph Company or of the Railroad Company may require;

And where they appear on page 4 as part of the following sentence: "subject to such change of location on such right of way as the necessities of the Telegraph Company or the Railroad Company may require;"

And where they appear on page 21 as part of the following sentence: "except as to such changes in location on said rights of way as the necessities of the Telegraph Company or the Railroad Company may, from time to time, require."

And plaintiff prays as in its petition, amended.

A. P. HUMPHREY AND
A. E. RICHARDS,

Attorneys for Plaintiff.

Order Tendering Amended Petition.

Entered March 29, 1913.

This day came again the parties by their attorneys. Came also the jury pursuant to order of adjournment. The plaintiff tendered an Amended Petition herein and moved the Court to file same, to the filing of which the defendant objects.

The evidence was concluded. It is ordered by the Court that the jury be adjourned until April 1, 1913.

129

Order Filing Amended Petition.

Entered March 31, 1913.

This day came again the parties by their attorneys. The Court being now sufficiently advised of the plaintiff's motion to file an Amended Petition herein, it is considered, ordered and adjudged that said motion be, and it is, hereby sustained, and said Amended Petition is accordingly filed.

The defendant moved the Court to exclude the testimony of J. R. Terhune, introduced by plaintiff, on the subject of necessity for the taking of any part of defendant's right of way for a telegraph line because irrelevant and incompetent and no such issue to be tried by the Court or jury is provided for by statute, to which the plaintiff objects, and the Court being sufficiently advised of said motion overrules same, to which defendant excepts. The defendant moves the Court upon all the evidence introduced at the trial to dismiss this case without submitting the same to the jury, to which the plaintiff objects, and the Court being sufficiently advised thereof, it is considered, ordered and adjudged that said motion be overruled, to which the defendant excepts.

It is ordered that the jury be adjourned until tomorrow morning at 9 o'clock.

Amended Petition.

Filed March 31, 1913.

The plaintiff amends its petition herein and says:

1. That it hereby withdraws its application contained in its original petition herein for the condemnation of the following line therein described, to-wit:

A. The line described under the number 30 in its original petition and called therein the Wasioto and Black Mountain Railway Division of said railroad company, to-wit, Louisville & Nashville Railroad Company, and all spurs and branches thereof occupied
130 by the plaintiff and containing approximately sixty-five miles of pole line.

B. That part of the railroad in the petition described under number 32 of the petition and therein described as a line of the Louisville & Nashville Railroad Company commonly known as the Louisville Transfer track, and containing approximately four miles of pole line, and being described as running from a point at or near the intersection of New Main Street and Mellwood Avenue in the City of Louisville, to a point in South Louisville, Jefferson County, Kentucky, at or near the point of junction of the right of way of the Louisville Transfer with the right of way of the main stem of the Louisville & Nashville Railroad Company.

2. Your petitioner further amends its petition herein and says that in the event the defendant should at any time desire to change the location of its tracks, or to construct new tracks, or to construct new depots or other buildings, or change the location of same where any of your petitioner's poles or wires are located upon defendant's right of way, your petitioner hereby consents and agrees to remove its said poles and wires at said points to any other part of the defendant's right of way adjacent thereto designated by the defendant, upon due and reasonable notice in writing to that effect, and at the expense of your petitioner, or in case there is no adjacent place in which such poles and wires can be placed without interfering with tracks or depots or other buildings, then on the right of way or without interfering with the aforesaid changes in the location of its tracks, or the construction of such new tracks, or the construction of such new depots, or other buildings, then petitioner consents and agrees to remove said poles and wires off the right of way upon such due and reasonable notice and at its own expense.

And your petitioner prays as before.

A. E. RICHARDS,
ALEX. P. HUMPHREY,
F. P. STRAUSS,

Attorneys for Plaintiff.

131 *Order Concerning Arguments of Counsel to Jury.*

Entered April 1, 1913.

This day came again the parties by their attorneys. Came also the jury pursuant to order of adjournment. The jury heard the arguments of counsel and there not being time to charge the jury today, time is taken until tomorrow.

Order Concerning Court's Charge to Jury.

Entered April 2, 1913.

This day came again the parties by their attorneys. Came also the jury pursuant to order of adjournment. The Court having delivered its charge to the jury, the jury retired to consider of its verdict. The hour of adjournment having arrived, and the jury having not reached a verdict, it is ordered that the jury be adjourned until tomorrow morning at 9 o'clock.

Judgment on Verdict of Jury.

Entered April 3, 1913.

In this case the claim of the Western Union Telegraph Company to have condemned for its use the right to construct, maintain and operate its line of telegraph upon the right of way of the defendant, the Louisville & Nashville Railroad Company, in this State as hereinafter described, and in the manner hereafter described, was submitted, on the 2d day of April, 1913, to a jury composed of Wm. J. Sauer, John F. Ecker, W. E. Hess, Edward H. Clarke, Alf. Taylor, J. J. Nuckols, James H. Albert, G. W. Luckett, Ernest C. Adolph, W. O. Farnam, John Franck and Wm. L. McPheeters. Said jury on April 3, 1913, returned a verdict fixing said defendant's due compensation and damages at five hundred thousand (\$500,000) dollars, and the verdict was received and entered.

The right of way of the Louisville & Nashville Railroad Company above referred to is as follows, viz.:

Main Stem, Louisville to Bowling Green, 112.8 miles. For a part of this distance there is at present a line of telegraph on both sides of the right of way—where this is the case this judgment is only to apply to the west side of the right of way.

Main Stem, Bowling Green to Tennessee State line 27.1 miles. For a part of this distance there is at present a line of telegraph on both sides of the right of way, but where this is the case this judgment is only to apply to the west side of the right of way.

Bardstown & Springfield Branch, Bardstown Junction to Springfield, 37.1 miles. Lebanon Branch, Lebanon Junction to Sinks, 107.1 miles; Greensburg Branch, C. & O. Junction to Greensburg, 30.4 miles; Scottsville Branch, Scottsville to Tennessee State line 9.9 miles; Cincinnati Division, Louisville to Ohio State line on the Newport and Cincinnati Bridge, 107.2 miles; Lexington Branch, La Grange to Lexington, 65.7 miles; Shelbyville Branch & Shelby Cut-Off, Anchorage to Christiansburg, 27.0 miles; Bloomfield Branch, Shelbyville to Bloomfield, 25.7 miles; Kentucky Division, Covington to Corbin, 184.1 miles; Paris & Lexington Branch, Paris to Lexington, 17.6 miles; Paris & Maysville Branch, Paris to Maysville 49.5 miles; Richmond Branch, Fort Estill Junction to Rowland 30.5 miles; Louisville & Atlantic Railroad, Versailles to Beattyville Junction, 99.2 miles; Knoxville Division, Corbin to Tennessee State Line, 29.7 miles; Knoxville Division, Saxton to Jellico, 3.2 miles; Halsey Branch, Jellico to Halsey, 8.1 miles; Cumberland Valley Division, Corbin to Virginia State Line, 46.7 miles; Middlesborough Railroad, Middlesboro to Stony Fork Junction, 2.9 miles; Chenoa Branch, Orby to Chenoa, 12.1 miles; Memphis Line, Memphis Junction to Guthrie, 46.5 miles; Owensboro & Nashville Division, Adairville to Owensboro, 83.4 miles; Clarks-
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 ville & Princeton Division, Gracey to Tennessee State Line, 23.0 miles; Henderson Division, Guthrie to Indiana State Line on Bridge

over Ohio River at Henderson, 98.6 miles; Morganfield Branch, Madisonville to Providence, 16.1 miles; Madisonville, Hartford & Eastern Railroad, Atkinson to Ellmitch 55.5 miles. Total mileage, 1356.7 miles.

It is adjudged that the petitioner is to have the right perpetually to construct, maintain and operate its lines of telegraph, consisting of poles, wires and fixtures, over, upon and along said right of way above described, and to occupy said right of way and structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by the petitioner with the poles, wires and appurtenances, and to maintain and operate its said line of telegraph where now placed and located, or hereafter constructed, subject to such changes in location of such right of way as the necessities of the Railroad Company may require, together with the right and easement on the part of the Western Union Telegraph Company to enter on and over the said right of way and structures of said Railroad Company for the purpose of maintaining, rebuilding or reconstructing the said telegraph line along the same.

It is further adjudged as follows: That in any removal or reconstruction of said telegraph line no more land along the right of way of the defendant Railroad Company shall be used than that now occupied by the petitioner.

That the Railroad Company shall have the right to take from that part of the right of way over which the wires of the petitioner may be strung all the dirt, gravel, sand, stone, water and other materials of every kind and character that the Railroad Company may need from time to time; and in the event that said right of way is cut down or the grade thereof changed in any manner, the petitioner is to reset its poles and its wires at its own expense, upon due and reasonable notice in writing to that effect, so as to make them conform to such new grade; and said poles shall not be so set as to interfere with any ditch, drain or culvert or other work or structures of the defendant.

That in the event the defendant Railroad Company shall at any time desire to change the location of its tracks or to construct new tracks or to construct new depots or other buildings, or to change

the location of same where any of the petitioner's poles or wires are located upon its right of way, the petitioner shall remove its
134 said poles and wires at said points to any other part of the defendant's right of way adjacent thereto designated by the defendant, upon due and reasonable notice in writing to that effect, at the expense of the petitioner, and in case there is no adjacent place upon which said poles and wires can be placed without interfering with tracks or depots or other buildings then on the right of way, or without interfering with the aforesaid changes in the location of its track or the construction of such new track, or the construction of such new depots or other buildings, the petitioner shall remove such poles and wires off the right of way, upon such due and reasonable notice and at its own expense.

That the petitioner shall assume all the risks of its poles, wires, insulators and cross-arms, and shall hold the defendant, the Louisville & Nashville Railroad Company, harmless from any damage to

any of the petitioner's property occasioned by the burning of grass or undergrowth upon said railroad right of way; and said petitioner shall have no right to fence any of said right of way, nor in any manner to exclude the defendant therefrom.

That upon payment of the above award either to the defendant, Louisville & Nashville Railroad Company, or to the Clerk of this court, and all costs in this behalf expended by defendant, the petitioner, the Western Union Telegraph Company, may continue in the occupancy of said property of the defendant Railroad Company, and continue to appropriate as much thereof as is above described.

Unless the petitioner shall pay the amount of the award as aforesaid on or before the 1st day of July, 1913, the petitioner shall be deemed and considered to have abandoned this proceeding to condemn the property and rights above described, over, on and along the said railroad rights of way of the defendant for the construction, operation and maintenance of a telegraph line thereon, and all rights thereto acquired under this judgment shall be deemed and considered to have been forfeited by the petitioner, and the defendant shall be entitled to recover of the petitioner, and is hereby adjudged its costs herein expended, for which execution may issue.

That in the event the Western Union Telegraph Company shall pay the amount of said award to the Clerk of this court, then the Clerk of this court shall mail written notice of these proceedings and

of the award to the trustees hereinafter named in the mortgage set out in the answer of the defendant herein, to-wit:

135 Central Trust Company of New York, Trustee under mortgage dated June 1, 1880; Central Trust Company of New York, Trustee under mortgage dated June 2, 1890 United States Trust Company, Trustee under mortgage dated April 30, 1887; Louisville & Nashville Railroad Company, Trustee under mortgage dated October 15, 1906, executed by Gallatin & Scottsville Railway Company; Mercantile Trust Company of New York, Trustee under Mortgage dated November 1, 1881, executed by Louisville, Cincinnati & Lexington Railway Company; Farmers Loan & Trust Company, Trustee under mortgage dated July 1, 1895, executed by the Newport & Cincinnati Bridge Company; United States Trust Company of New York, Trustee under mortgage dated April 1, 1905; Central Trust Company of New York, Trustee under mortgage dated Dec. 6, 1879, executed by Evansville, Henderson & Nashville Railroad Company; Central Trust Company of New York, Trustee under mortgage dated September 1, 1881, executed by the Henderson Bridge Company; Louisville & Nashville Railroad Company, Trustee under mortgage dated May 6, 1907, executed by Morganfield & Atlanta Railroad Company; Metropolitan Trust Company of New York, Trustee under mortgage dated July 1, 1887, executed by Kentucky Central Railway Company; Central Trust Company, Trustee under mortgage executed by Owensboro & Nashville Railroad Company, dated November 1, 1881.

The payment of the amount of said award shall not be made by the petitioner to the Clerk of this court if the defendant shall obtain and file with him on or before the 1st day of July, 1913, written release or waivers by the Trustees aforesaid of their right or claim to have the amount of said award, or any part thereof, paid to the Clerk of

this court, and consenting that the same may be paid to the defendant.

That execution of this judgment is suspended until May 5, 1913, in order to give to each party time in which to file a petition for a new trial; and time is given to each of the parties until July 1, 1913, to tender a bill of exceptions herein.

136 *Order Filing Plaintiff's Motion for New Trial.*

Entered May 3, 1913.

This day came the plaintiff by Richards & Harris and Humphrey, Middleton & Humphrey, its counsel, and tendered a motion for a new trial herein, which is now ordered filed.

Petition of Plaintiff for New Trial.

Filed May 3, 1913.

The plaintiff, Western Union Telegraph Company, exhibits this, its Petition, to the court and asks the court to set aside the verdict of the jury heretofore rendered in this cause and the judgment based thereon, and to grant to the plaintiff a new trial, and assigns as grounds for its motion herein the following, to-wit:

1. Your petitioner respectfully represents that the court erred in the trial of this case in allowing the following witnesses, to-wit: J. W. Bales, J. W. Herndon, R. B. Taylor, A. S. Thompson, George W. Young, R. O. Duncan, J. R. Stout, Geo. W. Ransler, Charles G. Mason, Hart Wallace, Charles Connell, W. C. Montgomery, D. W. Rider, Dr. J. B. Grant, W. T. Brown, H. E. Thomas, J. R. Kirby, Jas. H. Wilkerson, D. B. Strange, L. A. Scarce, E. M. Hundley, R. D. Bruce, Merritt Rogers, Early Vaughan, R. L. Irvine, F. R. Neale, Richard Wathen, E. E. Snyder, M. J. Moss, W. H. Bryan, John B. Finn, Max T. Price, A. B. Gosler, O. B. Hollingsworth, R. C. Morrison, F. C. Flynt, C. B. Nuckols, G. M. Covington, T. B. Hunt, L. M. Lannie, J. T. Alexander Minnus, C. C. Givens, B. M. Brooks, Dr. J. E. Bell, Jno. W. Logsdon, P. W. Stark, A. B. Sullivan, G. B. Moseley, David Bell, G. S. Boggs, W. S. Witt, C. W. Sale, A. H. Warner, Chas. Evelett, R. N. Hudson, Chas. Chandler and Milton H. Smith, to give their opinions as to the value of the property to be taken by the plaintiff and the diminution in value

137 of the remainder of the right of way of the defendant, when said witnesses had entirely failed to qualify themselves to express any opinion upon the subject; and notwithstanding the fact that the plaintiff objected to such testimony being given, and notwithstanding the fact that the plaintiff at once, upon such testimony being given, in each instance, moved the court to exclude the same from the jury, yet the court failed then to do so, but postponed the consideration of said motion until all of the evidence had been heard by the jury; that then the court did sustain the motion of the plaintiff to exclude this opinion-evidence from the jury, but that in the

meanwhile this testimony had found such a lodgment in the mind of the jury that notwithstanding the instruction of the court to the jury that they should disregard the said testimony, the jury did not do so and as appears from the amount of the verdict, based the same upon this incompetent evidence, although the jury had been told to disregard it.

2. Your petitioner respectfully represents that in many instances questions objected to by the plaintiff upon the ground that they were irrelevant and incompetent, were asked by counsel for the defendant in the presence of the jury of witnesses introduced by the defendant, and the court sustained such objections and refused to allow the witness to answer, notwithstanding this, the counsel for the defendant persisted in asking other witnesses substantially similar questions, and upon the court making a similar ruling, the counsel for the defendant made an avowal as to what it proposed to prove, though not in the hearing of the jury, and thereby the jury got the impression that the witness, if allowed to answer the question, would have answered it favorably to the defendant; and in other instances the counsel for the defendant asked certain witnesses a question which was objected to, but the court allowed the witness to answer the question; and thereupon, upon the motion of the plaintiff, ruled that the matter inquired about was irrelevant and incompetent and directed the jury to disregard what had been said by the witness. Notwithstanding such ruling the defendant's counsel subsequently, on divers occasions, asked other witnesses concerning the same subject-matter which had, as above, been ruled to be irrelevant and incompetent; and, upon objection being made by the plaintiff to the question, and being sustained by the court, the defendant made avowals to the stenographer in the presence, but not in the hearing, of the jury, all of which produced

138 the impression upon the minds of the jury that if the witness had been allowed to answer the question he would have answered it in the same way as other witnesses had answered it, although such answers had been stricken out as irrelevant and incompetent; and thereupon there was produced in the minds of the jury an erroneous impression of the real relevant facts of this controversy, which impression is reflected in the excessive verdict which was rendered by the jury in this case.

3. Your petitioner says that at the conclusion of all of the testimony the court ruled that the opinions of the witnesses which had been given as to the value of the right of way taken by the plaintiff and the diminution in value of the remainder of the right of way was incompetent as having been given by witnesses who had not qualified themselves to testify, or who embraced in their estimate elements of value or damage which were improper to be considered. This left no competent testimony upon which to find a verdict other than the testimony of witnesses of value of the land adjacent to the right of way of defendant, and the testimony as to the additional cost of building a telephone and signal line upon the opposite side or the same side of the right of way occupied by the plaintiff herein

and the verdict of the jury based upon this competent testimony is manifestly grossly excessive.

4. Your petitioner says that the amount of the verdict herein is grossly excessive, in that it is vastly more than the value of the land proposed to be taken by the plaintiff with the right of ingress and egress, and vastly more than such value combined with diminution of the value of the remainder of the right of way for railroad purposes. Even though there is added thereto the additional cost to the defendant of building a telephone line on the opposite or the same side of its right of way as that occupied by the plaintiff, that at most the value of the right of way taken, including diminution of the value to the remainder of the right of way, should not exceed \$500.00, and the additional cost of building a telephone line can not, under the evidence, exceed \$3,000.00, and that anything more than \$3,500.00 would be, only not supported by the evidence but contrary to the competent evidence in this case.

5. Your petitioner further says that it is apparent that the jury in fixing the amount of their verdict did so upon the basis of evidence which had been heard by them, but which the court had ruled to be irrelevant and incompetent. It is evident that said verdict was given by the jury in disregard of the instructions given to the jury by the court, and that such excessive verdict appears to have been given under the influence of passion or prejudice.

6. Your petitioner further says that the verdict is not sustained by the evidence and is contrary to the law given to the jury by the court.

HUMPHREY, MIDDLETON & HUMPHREY,
RICHARDS & HARRIS,

Attorneys for Western Union Tel. Co.

Allowed to be filed this 3d day of May, 1913.

WALTER EVANS,

Judge.

Order Extending Time to Parties to File Bill of Exceptions and Payment of Jury's Award.

Entered June 23, 1913.

The time given to each of the parties until July 1, 1913, to tender a bill of exceptions herein is extended until sixty (60) days after the court acts upon the pending petition for a new trial. The time for the payment of the award of the jury or the abandonment of this proceeding to condemn by the plaintiff, in the event a new trial shall be refused by the court is also extended for thirty (30) days after such action by the court, and the defendant has leave for the same time to obtain and file with the clerk of this court written releases or waivers by the Trustees in the mortgages set out in the

judgment entered herein April 3, 1913, before payment of said award shall be made by the plaintiff to said Clerk.

140 *Order Filing Opinion Sustaining Plaintiff's Motion for New Trial and Granting 60 Days for Defendant to File Bill of Exceptions.*

Entered December 13, 1913.

The court being advised of the petition of the plaintiff herein for a new trial, delivered an opinion in writing which is ordered to be filed. In consideration whereof, it is now adjudged that the prayer of said petition be, and it is hereby, sustained, and that a new trial be, and is hereby, granted to the plaintiff; and to this end, that the verdict of the jury returned herein on April 3, 1913, and the judgment of the court entered upon said verdict on that day be, and each of them is hereby, set aside and held for naught, and this cause restored to the docket for a new trial. To all of which the defendant excepts, and sixty days' time is hereby given to it to tender a bill of exceptions herein.

Memorandum Opinion on Motion for a New Trial.

Filed December 13, 1913.

So far as we are advised, this is the first proceeding ever begun and prosecuted to a verdict under the Act of March 19, 1898, now Section 4679a of the Kentucky Statutes. It was, therefore, a pioneer case in which very numerous questions of more or less importance and difficulty were presented for decision. It was hardly hoped that we should be able to travel through the unexplored territory without going astray somewhere or somehow in a trial extending over a period of several weeks.

The verdict of the jury assessed the compensation for the property sought to be condemned at \$500,000.00, and one principal ground upon which a new trial is sought by the plaintiff is, that this assessment was extravagantly large, and was the result
141 of the action of the court in tentatively admitting as testimony certain opinions as to values of numerous witnesses, which opinions were in the end excluded as incompetent, because the persons who testified to them were not shown to possess, and did not possess, the qualifications necessary to show such witnesses to be experts in the matters testified to, and therefore entitled to give opinions based upon special knowledge of the subject. Because of a failure to show such special knowledge, the court, which had left the whole question open to the last moment, at the close of the testimony, in the most explicit terms, directed the jury to disregard all such opinion testimony. It is now insisted upon the one side that the jury could not have assessed the compensation at so high a figure if the court's direction had been obeyed, and upon the other that the jury alone had the right and power to find the

values and damages, and, having exercised that power under the court's charge and the explicit direction to which we have referred, their verdict should not be disturbed.

The testimony, so far as it was excluded, was ultimately regarded by the court as mere guess work, but that guess work was so elaborately prepared, was apparently so exaggerated in character, and so liable to impress the imagination of the jurors, that it is open to inquiry whether it did not exert an influence upon them in spite of the direction of the court to the contrary.

The question of the admissibility of this so-called opinion testimony, was much considered, but not until it had all been heard by the jury did the court, in the midst of its other labors (incessant during the three weeks' trial), find itself able to reach a definite conclusion upon it.

Much of the evidence, as we have seen, had been presented to the jury many days before the court had definitely made up its mind about its admissibility, and we are strongly of opinion that its influence upon the jury was by no means effaced by the direction to disregard it.

The court, in a charge to the jury, prepared with great labor and care, clearly stated the elements of compensation to which the jurors should confine themselves. Those elements were such as the statute authorizes in a case like this, where the property of one public utility corporation, which can only be used for railroad purposes, is not being so used, and which the statute therefore authorizes another utility corporation to condemn for the benefit, in large measure, of the public as well as that of the utility corporation. In addition,

142 tion, in this case there is a distinct undertaking made in the pleadings upon the part of the Telegraph Company to change the location of its pole lines in the event that what it has taken shall be needed by the Railroad Company, the latter substituting other pole line facilities in lieu thereof. The property to be taken under this proceeding, therefore, for public purposes, is property not used by the Railroad Company. For many years, in town and country, the writer has been accustomed to observe the Telegraph Company's lines running through both. Those lines run mainly through the country and its forests, though often through fields and farms. Largely, I have no doubt, the lines of the Telegraph Company through towns and cities are not involved in this litigation, franchises to run through towns and cities being usually granted by them, and they do not then interfere with the Railroad Company.

When the testimony is considered in connection with the elements of compensation fixed by the statute, we have not been able to doubt that the jury either disregarded those elements or else they greatly exaggerated values in reaching their verdict. We think this is clear from the amount of the verdict, which otherwise could scarcely have been anything like so much when confined to the legal elements of compensation pointed out in the charge. In the absence of that testimony, the verdict, in our opinion, was clearly and palpably excessive. Indeed, we find it impossible not to believe that the excluded testimony had obtained such a hold upon the jury as greatly to in-

fluence the jurors in spite of the court's direction. We recall with vividness the other testimony in the case, but we think it failed to show that just compensation to defendant should be a sum anything like so great as \$500,000.00. Under these circumstances, we are not content to let the verdict stand.

Another matter may properly be alluded to:

In its petition for a new trial the Telegraph Company urges as a second ground for that relief, that in the progress of the trial irrelevant and incompetent questions were asked witnesses; that objections thereto were sustained, but nevertheless that defendant persisted, again and again, in asking the same questions. The petition for a new trial states this ground with elaboration, but what we have said will, for present purposes, suffice. Plaintiff's counsel cite two cases decided by the Court of Appeals in which this ground for a new trial was quite vigorously upheld in favor of the Louisville & Nashville Railroad Company. Those cases were Louisville & Nashville Railroad Company v. Payne, 133 Ky. 539, 543, 544, 545, and 143-146 Louisville & Nashville Railroad Company v. Reaume, 128 Ky. 90. In the first of these cases the impropriety of the practice was very explicitly shown, and so it was also in the second of them.

While we are not authoritatively bound by these rulings on a motion for a new trial, we are quite clear in the conviction that the doctrine they propound is a very salutary one, but as we hope to follow the course thus suggested at any future trial of the case, and shall ask the aid of counsel in doing so, we will not base our judgment upon it in passing upon the pending motion. We mean by this that while always allowing counsel for all parties to make their points clearly and fully, so as perfectly to get the benefit of exception to any ruling we may make, yet that one such ruling, when clearly and adequately made, will serve as well for appellate purposes and action as would a dozen. There cannot, therefore, under ordinary circumstances, be any legitimate need for repetition if the point is once clearly made and exception saved.

There might also be suggestions as to other matters influencing the court in the exercise of its discretion in the premises, but we refrain. Greatly regretting that we shall all have to bear the burden and strain of another trial of the case, we nevertheless must grant the petition for a new trial upon the grounds indicated.

The judgment entered on the verdict and the verdict itself must be set aside, and a new trial granted, and this may be had beginning at some convenient time.

An order accordingly may be prepared and entered.

December 13, 1913

WALTER EVANS,

Judge.

Order Filing Amended Petition.

Entered March 9, 1914.

This day came the plaintiff and tendered an Amended Petition which is now ordered filed, and the defendant is given ten days from this date within which to answer same if it should so desire.

By consent of parties, it is ordered that this cause be assigned to the 20th day of May, 1914, for trial.

Amended Petition.

Filed March 9, 1914.

The plaintiff, the Western Union Telegraph Company, states that in its petition as originally filed herein it asked for a condemnation of the following, as described in Paragraph 28 of its petition, viz :

"Also that portion of the right of way and structures, including bridges, tunnels, trestles and viaducts of the defendant Railroad Company now occupied by this plaintiff, with a connecting line of telegraph from a point in the right of way of said defendant Railroad Company at or near the station of Savoy in the County of Whitley, and extending thence in a general eastwardly direction along the right of way and structures of said Railroad Company, in and through the County of Whitley, to a point at or near the station of the said Railroad Company at Gatliff, Whitley County, Kentucky."

This paragraph was intended to designate the line of the Louisville & Nashville Railroad Company commonly known as the Pine Mountain Railroad Branch, together with all spurs and branches thereof now occupied by the Telegraph Company, and containing, as stated in the original petition, approximately seventeen miles of pole line, but should have been twenty-one miles of pole line.

The plaintiff says that the defendant in its answer herein, 148 denied that it owned the above described right of way, alleging that it was owned by the Pine Mountain Railroad Company, a corporation organized and existing under the laws of the State of Kentucky, and further alleging that the defendant simply operated said railroad for the account of said Pine Mountain Railroad Company.

The plaintiff says that upon the former trial of this case it was not able to produce any proof showing that this right of way as above described did belong to the said Louisville & Nashville Railroad Company; and, therefore, this plaintiff was compelled to say to the court, and did so say, that it would not ask the court, in charging the jury, to include the above described property in the verdict.

Now the plaintiff says that since said announcement upon its part to the court the said Pine Mountain Railroad Company has conveyed the above described property to the defendant, the Louisville &

Nashville Railroad Company, and the defendant now owns and has, for many months last past, owned the same.

The plaintiff now amends its petition herein and includes in this suit the right of way as above described, being the same heretofore described in Paragraph 28 of its original petition, with the exception of the correction of the mistake as to mileage as above.

And plaintiff now prays that this property be included within the condemnation, under the same terms and conditions as are set forth in its petition and amended petition as to the rest of the right of way of the said defendant Railroad Company.

And plaintiff states as before, and prays as before, and for all proper relief.

F. P. STRAUSS,
RICHARDS & HARRIS,
HUMPHREY, MIDDLETON &
HUMPHREY,

Attorneys for Plaintiff.

149 *Order Entered April 15, 1914, Reciting Stipulation Between Counsel Concerning Amended Petition.*

Filed March 9, 1914.

This day came the parties by their respective counsel and filed a stipulation in writing, in words and figures as follows:

"It is hereby stipulated and agreed between counsel for plaintiff and defendant that when the amended petition was tendered herein on March 9, 1914, the defendant objected to the motion to file the same, but the court overruled its objection and permitted the same to be filed, to which the defendant excepted.

"It is further stipulated and agreed between counsel for plaintiff and defendant that the defendant may have until April 24, 1914, to file its answer to said amended petition.

A. E. RICHARDS,
ALEX. P. HUMPHREY,
Attorneys for Plaintiff.

HELM BRUCE,
ED. S. JOUETT,
HENRY L. STONE,
Attorneys for Defendant."

Order Filing Answer to Amended Petition.

Entered April 18, 1914.

It is ordered that the answer of the defendant to the amended petition, filed herein March 9, 1914, this day tendered, be now filed.

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Answer to Amended Petition.

Filed April 18, 1914.

First Paragraph. The defendant, Louisville & Nashville Railroad Company, for answer to the amended petition of the plaintiff, Western Union Telegraph Company, filed herein March 9, 1914, pleads, refers to and makes part hereof the first twenty-two paragraphs of its original answer herein filed on the 2d day of November, 1912, and the first paragraph of the amended answer filed herein on the 28th day of December, 1912.

Second Paragraph. The defendant, for further answer herein to the plaintiff's said amended petition concerning the Pine Mountain Railroad, states it is true the Pine Mountain Railroad Company, for a valuable consideration, had conveyed, prior to the filing of said amended petition, to-wit, on the first day of April, 1913, the Pine Mountain Railroad, including its right of way, privileges, franchises, appurtenances and property of every description, whether real, personal or mixed, and all improvements and structures thereon, situated in Bell, Knox and Whitley Counties, in the Eastern District of Kentucky, in which said deed of conveyance had been duly recorded prior to the filing of said amended petition herein, and since said conveyance the defendant herein has been, and is now, the owner and in possession of said Pine Mountain Railroad and the properties conveyed as aforesaid, including the line of poles and wires situated thereon, and after the abandonment by the Western Union Telegraph Company in this suit of its effort to condemn a portion of the right of way of said Pine Mountain Railroad the defendant instituted its suit in equity in the United States District Court for the Eastern District of Kentucky on the 24th day of May, 1913, wherein the defendant, Louisville & Nashville Railroad Company, set up its claim and ownership to the said line of poles and wires situated on the right of way of said Pine Mountain Railroad, to which the plaintiff, Western Union Telegraph Company, is likewise asserting claim or title, which suit is still pending and undetermined in said United States District Court, and in which the defendant, Louisville & Nashville Railroad Company, prays that its said claim to the said line of poles and wires, and its title thereto, be quieted and its possession thereof be sustained and upheld, and that the claim of the plaintiff, Western Union Telegraph Company, to said property be adjudged, ordered and decreed to be invalid, and for all relief to which the defendant, as the complainant in said suit, may appear to be entitled.

151 The defendant states that the plaintiff has no power or authority to condemn for a telegraph line the same location on the right of way of said Pine Mountain Railroad as that now occupied by said line of poles and wires which belongs to and is the property of the defendant, for the reasons and upon the grounds set forth in its bill in equity in the court aforesaid.

The defendant states the condemnation of the location of said

line of poles and wires would deprive the defendant of the use thereof which it now has and which is necessary in the operation of said Pine Mountain Railroad as a part of its system of railroads in Kentucky.

Wherefore, having answered, the defendant prays as in its said original answer and amended answer herein, and for all other relief to which it may appear to be entitled.

HELM BRUCE,
ED. S. JOUETT,
HENRY L. STONE,
Solicitors for Defendant.

Order Setting Case for Trial May 20, 1915.

Entered January 15, 1915.

By agreement of parties it is ordered that this cause be assigned to May 20, 1915, for trial.

152 *Order by Agreement Reassigning Case for Trial October 20, 1915.*

Entered May 20, 1915.

By agreement of parties it is now ordered that this case be continued to October 20, 1915, for trial.

Order Filing Amended Answer.

Entered October 7, 1915.

This day came the defendant, Louisville & Nashville Railroad Company, by Henry L. Stone, its counsel, and tendered an Amended Answer, which is now ordered filed.

Amended Answer.

Filed October 7, 1915.

1. The defendant, for amended answer herein, states the lengths of the several rights of way on, along and over which the plaintiff seeks to condemn the location now and heretofore occupied by its poles, wires and other fixtures for a telegraph line, as set out in its petition as amended, are as follows:

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Main Stem, Louisville to Bowling Green..... 112.8 miles

(For the greater part of this distance there is at present a line of telegraph on both sides of the right of way, but where this is the case the condemnation sought is only to apply to the west side of the right of way.)

Main Stem, Bowling Green to Tennessee State Line. . . 27.1 miles

(For a part of this distance there is at present a line of telegraph on both sides of the right of way, but where this is the case the condemnation sought is only to apply to the west side of the right of way.)

Bardstown & Springfield Branch:

Bardstown Junction to Springfield. 37.1 miles

Lebanon Junction:

Lebanon Junction to Sinks. 107.1 miles

Greensburg Branch:

C. & O. Junction to Greensburg. 30.4 miles

Scottsville Branch:

Scottsville to Tennessee State Line. 9.9 miles

Cincinnati Division:

Louisville to Ohio State Line on the Newport and

Cincinnati Bridge 107.2 miles

Lexington Branch:

La Grange to Lexington. 65.7 miles

Shelby Branch and Shelby Cut-Off:

Anchorage to Christiansburg. 27.0 miles

Bloomfield Branch:

Shelbyville to Bloomfield. 25.7 miles

Kentucky Division:

Covington to Corbin. 184.1 miles

Paris & Lexington Branch:

Paris to Lexington. 17.6 miles

Paris & Maysville Branch:

Paris to Maysville. 49.5 miles

Richmond Branch:

Fort Estill Junction to Rowland. 30.5 miles

Louisville & Atlantic Railroad:

Versailles to Beattyville Junction. 99.2 miles

Knoxville Division:

Corbin to Tennessee State Line. 29.7 miles

Knoxville Division:

Saxton to Jellico. 3.2 miles

Halsey Branch:

Jellico to Halsey. 8.1 miles

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Cumberland Valley Division:

Corbin to Virginia State Line. 46.7 miles

Middlesboro Railroad:

Middlesboro to Stony Fork Junction. 2.9 miles

Chenoa Branch:

Orby to Chenoa. 12.1 miles

Memphis Line:

Memphis Junction to Guthrie. 46.5 miles

Owensboro & Nashville Division:	
Adairville to Owensboro.....	83.4 miles
Clarksville & Princeton Division:	
Gracey to Tennessee State Line.....	23.0 miles
Henderson Division:	
Guthrie to Indiana State Line on Bridge over Ohio River at Henderson.....	98.6 miles
Morganfield Branch:	
Madisonville to Providence.....	16.1 miles
Madisonville, Hartford & Eastern Railroad:	
Atkinson to Ellmitch.....	55.5 miles
Pine Mountain Railroad:	
Savoy to Packard and to Gatliff.....	20.0 miles
Total mileage	1,376.7 miles

These distances of said several rights of way sought to be condemned by plaintiff as aforesaid are not accurately set forth in plaintiff's petition as amended, either separately or in the aggregate.

2 The defendant, for further amended answer herein, states that it is the owner and in possession of thirteen (13) bridges over and across navigable streams or waters within the State of Kentucky, and also of two (2) other bridges across the Ohio River, a navigable stream forming the boundary line between the States of Kentucky and Ohio and defendant's railroads have been laid upon and constructed and operated and maintained upon these bridges, which are a part of the property of the defendant on, over and along which the plaintiff seeks herein to condemn for the construction, operation and maintenance of a telegraph line composed of poles, braces, guys, cross-arms, wires and other fixtures to be attached and fastened thereto.

The following statement shows (1) the names of these navigable streams over and across which said bridges are erected, maintained and operated; (2) the nearest city or town thereto; (3) the mile number where situated; (4) the division embracing each of said bridges; (5) the length of each of said bridges; and (6) the length of the approaches in Kentucky of said bridges across the Ohio River, to-wit:

155	Name of stream.	Nearest city or town.	Mile number.	Division.	Length of bridge in ft. and in.	With approaches in Kentucky.
	Kentucky River.....	Ford.....	217	Kentucky.....	552' 3"	
	Kentucky River.....	Irvine.....	143	Louisville & Atlantic.....	1070' 0"	
	Kentucky River.....	Heidelberg.....	170	Louisville & Atlantic.....	355' 0"	
	Kentucky River.....	Valley View.....	108	Louisville & Atlantic.....	1557' 8"	
	Kentucky River.....	Worthville.....	54	Cincinnati.....	718' 3"	
	Kentucky River.....	Frankfort.....	65	Lexington Branch.....	501' 0"	
	Cumberland River.....	Pineville.....	205	Cumberland Valley.....	345' 6"	
	Cumberland River.....	Williamsburg.....	190	Knoxville.....	372' 0"	
	Green River.....	Munfordville.....	74	Main Stem 1st Division.....	1081' 0"	
	Green River.....	Smallhouse.....	299	Madisonville, Hartford & Eastern.....	369' 0"	
	Green River.....	Livernore.....	193	Owensboro & Nashville.....	510' 0"	
	Barren River.....	Bowling Green.....	113	Main Stem 1st Division.....	427' 0"	
	Licking River.....	Newport.....	106	Cincinnati.....	704' 0"	
	Ohio River.....	Cincinnati.....	110	Cincinnati.....	1319' 4"	504' 5"=1823' 9"
	Ohio River.....	Henderson.....	313	Henderson Division.....	1690' 0"	878' 0"=2568' 0"

The defendant states that the plaintiff has no power or authority under or by virtue of the provisions of any Act of the Congress of the United States or under the Act of the Legislature of Kentucky, approved March 19, 1898 (now Section 4679c, Kentucky Statutes, Carroll's Edition, 1915), to condemn for its uses and purposes any portion of either of said bridges of the defendant across the navigable streams or waters above described, on, over or along which to construct, operate and maintain a telegraph line composed of poles, braces, guys, cross-arms, wires, or other fixtures.

The defendant states that if the said Act of the Legislature, when properly construed, applies to or embraces within its scope or purpose such bridges of the defendant across navigable streams in the State of Kentucky, said Act is in violation of the Commerce Clause of the Constitution of the United States, which grants to the Congress of the United States exclusive power and authority over and concerning bridges erected, operated and maintained across the navigable streams or waters of the United States, such as those hereinabove mentioned are, and the power and authority to regulate their construction, operation and maintenance, and to determine what shall or shall not be or constitute an obstruction to the free navigation of

all such streams or waters, or a burden upon commerce among the several States in which the defendant is engaged in operating its railroad lines over said bridges rests solely in Congress to the exclusion of all power or authority in the State of Kentucky to legislate concerning such bridges, or to authorize or permit by any means it may provide to interfere with or lay burdens upon such commerce, or such bridges, which are and constitute instrument of such commerce as carried on by the defendant in the transportation of freight and passengers by its lines of railroad among the several States as a common carrier.

The defendant states that the construction, operation and maintenance by the plaintiff of a telegraph line of poles, braces, guys, cross-arms, wires and other fixtures upon defendant's said bridges across navigable streams and waters, in addition to defendant's own telegraph or telephone line, as well as signal line, which are necessary to enable defendant to carry on its business as a common carrier of interstate and intrastate freight and passengers by railroad, as well as of messages by telegraph or telephone (which it has lawful power and authority to do under and by virtue of its charter and amended articles of incorporation), will not only impair, depreciate and materially destroy the efficiency of said bridges, but will obstruct and interfere with the ordinary use, travel and traffic over defendant's railroads constructed, operated and maintained on said bridges and will lay a burden upon and interfere with commerce among the several States, and upon said bridges, as instruments for carrying on such commerce by defendant as aforesaid.

The defendant states that each and all its said bridges across navigable streams or waters were constructed and are being operated and maintained by defendant as, and they in fact are, necessary parts of lines and instruments of interstate commerce, under and by virtue of the rules and regulations prescribed by Acts of Congress

and of the Secretary of War, made and promulgated by him in pursuance of such Acts, and neither said bridges nor the use thereof can be altered or burdened in the manner the plaintiff seeks to do by means of this condemnation proceeding under the provisions of said State statute of March 19, 1898.

Wherefore, the defendant prays as in its original answer, and for all other proper relief.

EDWARD S. JOUETT,
HELM BRUCE,
HENRY L. STONE,
Attorneys for Defendant.

157 *Order Continuing Case for Trial on Defendant's Motion Until January 19, 1916.*

Entered October 11, 1915.

This day came the defendant, Louisville & Nashville Railroad Company, by Henry L. Stone, Helm Bruce and E. S. Jouett, its counsel, and moved the court to continue this case to January 19, 1916, for trial, and, in support of said motion, filed the affidavits of Henry L. Stone, Helm Bruce, E. S. Jouett and George E. Evans.

The court now being sufficiently advised of said motion and affidavits, it is considered, ordered and adjudged by the court that said motion be sustained, and that this case be continued until January 19, 1916, for trial.

Amended Petition.

Filed November 20, 1915.

The plaintiff, the Western Union Telegraph Company, amends its petition herein for the purpose of excluding from its prayer the appropriation of a right of way along the line of the defendant, the Louisville & Nashville Railroad Company, the following portions of said right of way, viz.:

(1) The east side of said right of way from Highland Park to Bowling Green, excepting that section thereof aggregating about 6.7 miles where there is a telegraph line only upon the east side of the said right of way.

(2) The right of way from Shelbyville (Bloomfield Junction) to Bloomfield.

(3) The right of way from Bardstown Junction to Springfield.

(4) The right of way from Lebanon to Greensburg.

(5) The right of way from Ft. Estill Junction to Rowland.

(6) The right of way from Cliffside, near Frankfort, to Beattyville Junction.

(7) The right of way from Savoy to Gatliff, with a branch to Packard.

158 (8) The right of way from Orby to Benham, with branches to Harlan and Yellow Creek.

(9) The right of way from Morganfield through Madisonville and Moorman to Ellmitch.

(10) The right of way called Louisville Transfer Line between East Louisville and South Louisville—about four miles, described in Paragraph 32 of the original petition for condemnation.

(11) The right of way between Elkton, Kentucky, and Guthrie, Kentucky—a distance of about 10.92 miles, described in Paragraph 10 of the original petition for condemnation.

And the plaintiff herewith withdraws its application for the condemnation of a right of way upon the right of way of the Louisville & Nashville Railroad Company as above described.

HUMPHREY, MIDDLETON & HUMPHREY,
RICHARDS & HARRIS,

Attorneys for Plaintiff.

Order Filing Plaintiff's Motion that the Court Hear Evidence and Determine Certain Questions Without a Jury.

Entered December 15, 1915.

This day came the plaintiff, Western Union Telegraph Company, by Richards & Harris and Humphrey, Middleton & Humphrey, its counsel, and tendered the following motion:

"That the court do not order a jury to be summoned in this case until the court has, upon a day fixed therefor, heard such evidence as the parties may desire to introduce upon the following questions:

159 "1. The necessity of the taking by the plaintiff of the easement sought by it herein, to be appropriated to its use, as described in the petition.

"2. Whether such appropriation, upon the location sought, and the erection, operation and maintenance in the usual manner of constructing, operating and maintaining telegraph lines, on or along or upon the right of way of the defendant, in the manner and upon the location prayed for in the petition, would interfere with the ordinary use by the defendant of its right of way, or with the ordinary travel and traffic on the railroad of the defendant.

"That is, that the court do not order a jury to be summoned to determine what compensation is due to the defendant until it has been determined by the court that the conditions precedent to the right of the plaintiff to condemn have been established."

which is now ordered filed, to which defendant objected.

It is further ordered that the aforesaid motion be set for December 18, 1915, for argument.

Motion of Plaintiff.

Filed December 15, 1915.

The plaintiff, Western Union Telegraph Company, now moves the court as follows:

That the court do not order a jury to be summoned in this case until the court has, upon a day fixed therefor, heard such evidence as the parties may desire to introduce upon the following questions:

1. The necessity of the taking by the plaintiff of the easement sought by it herein to be appropriated to its use, as described in the petition;

160 2. Whether such appropriation, upon the location sought, and the erection, operation and maintenance in the usual manner of constructing, operating and maintaining telegraph lines, on or along or upon the right of way of the defendant, in the manner and upon the location prayed for in the petition, would interfere with the ordinary use by the defendant of its right of way, or with the ordinary travel and traffic on the railroad of the defendant;

That is, that the court do not order a jury to be summoned to determine what compensation is due to the defendant until it has been determined by the court that the conditions precedent to the right of the plaintiff to condemn have been established.

RICHARDS & HARRIS,

HUMPHREY, MIDDLETON & HUMPHREY,

Attorneys for Plaintiff.

Order December 18, 1915, Concerning Argument of Counsel on Plaintiff's Motion.

Filed December 15, 1915.

This cause coming on this day for hearing on the motion of the plaintiff heretofore filed herein on December 15, 1915, was argued by counsel for the respective parties, and the court not now being sufficiently advised thereof, takes time to consider same.

161 *Opinion on Plaintiff's Motion Entered December 15, 1915, That the Court Hear Evidence and Determine Certain Questions Without a Jury.*

Filed December 20, 1915.

The plaintiff, on the 15th inst., moved the court as follows:

"That the court do not order a jury to be summoned in this case until the court has, upon a day fixed therefor, heard such evidence as the parties may desire to introduce upon the following questions:

"1. The necessity of the taking by the plaintiff of the easement sought by it herein to be appropriated to its use, as described in the petition;

"2. Whether such appropriation, upon the location sought, and the erection, operation and maintenance in the usual manner of constructing, operating and maintaining telegraph lines, on or along or upon the right of way of the defendant, in the manner and upon the location prayed for in the petition, would interfere with the ordinary use by the defendant of its right of way, or with the ordinary travel and traffic on the railroad of the defendant;

"That is, that the court do not order a jury to be summoned to determine what compensation is due to the defendant until it has been determined by the court that the conditions precedent to the right of the plaintiff to condemn have been established."

The court has considered the provisions of Section 4679c of the Kentucky Statutes, and has reached the conclusion that the only thing for the jury to do is to assess the damages under the 4th subsection of that section. The oath which the jurors are to take is as follows:

"I do solemnly swear that as a member of this jury, I will a true verdict render in this cause, assessing for the defendant that actual cash value of so much of its land as may be shown by the proof to be actually taken and occupied by the petitioner, and such other incidental damages, if any, as shown by the proof will accrue to the remainder of the right of way for the purpose for which it is held by the defendant, by reason of the construction of petitioner's telegraph line in the manner set out in the petition, so help me God."

As the function of the jury is very clearly defined by the oath which the members of the jury are to take, it seems to me that it was the intention of the Legislature to limit the functions of the jury to the amount of the damages, and to devolve upon the court the duty of determining the existence or non-existence of the conditions upon which the Telegraph Company, given the right to condemn a right of way as contemplated by the statute,

We have been cited to many authorities from other States, and they seem clearly to indicate that the construction of quite similar statutes in those States has been harmonious with what we have suggested as proper here.

See:

American Telephone & Telegraph Co. of Missouri v. St. Louis I. M. & S. R. R. Co., 101 S. W. 576.

St. Louis Railroad Co. v. Southwestern Telephone Company, 121 Fed. 283.

O'Hare v. Chicago, M. & N. R. R. Co., 139 Ill. 151-160.

Mobile & B. Co. v. Louisville & Nashville R. R. Co., 68 Southern, 906.

Western Union Telegraph Co. v. South & N. A. Co., 62 Southern, 788.

Indeed, at the argument the learned counsel for the defendants practically conceded the accuracy of the construction contended for by the plaintiff. This conclusion seems to be well sustained by *Warren v. Madisonville, etc., R. R. Co.*, 128 Ky. 565.

The court has reached the conclusion, therefore, that the motion of the plaintiff should be sustained.

The case has been set down for hearing on the 19th of January next, and at that time the court itself will hear the testimony bearing upon the questions which it must decide, and will postpone to a later date, say about February first, the hearing of the questions which the jury must determine. The engagements of the court are such that it can not well do otherwise than postpone the hearing before the jury to the date indicated. A venire will be directed for a jury to come at that time.

Orders may be prepared accordingly.

December 20, 1915.

WALTER EVANS,

Judge.

963 *Order Sustaining Plaintiff's Motion.*

Filed December 15, 1915; Entered December 20, 1915.

The court, being advised of a motion entered herein by the plaintiff on December 15, 1915, filed its Opinion herein, which is ordered to be made a part of the record; in consideration whereof, it is now ordered by the court as follows:

1. That on January 19, 1916, the date upon which this cause is set for hearing, the court will hear such evidence as the parties may desire to introduce upon the following questions:

(a) The necessity of the taking by the plaintiff of the easement sought by it herein, to be appropriated to its use as described in the petition as amended.

(b) Whether such appropriation upon the location sought, and the erection, operation and maintenance in the usual manner of constructing, operating and maintaining telegraph lines, on or along or upon the right of way of the defendant, in the manner and upon the location prayed for in the petition as amended, will interfere with the ordinary use by the defendant of its right of way, or with the ordinary travel and traffic on the railroad of the defendant.

2. That the Clerk shall summon a jury to appear herein, in this court on February 8, 1916, to consider the amount of damages to be awarded to the defendant under the statute, if, in the meantime, the court has determined the foregoing questions in favor of the plaintiff. To all and to each part of the foregoing order the defendant excepts.

- 164 *Order January 19, 1916, Filing Amended Petition, Entering Motions of Defendant to Require Plaintiff to Make Petition More Definite and Certain Submitted; to Strike Second Paragraph of Amended Petition Filed March 31, 1913, Filing Demurrer to Same Paragraph of Said Amended Petition, and Showing Partial Hearing on Questions by the Court.*

This cause coming on this day for hearing upon the questions set forth in the order entered herein on December 20, 1915, the parties appeared by their respective counsel, and the plaintiff tendered an Amended Petition herein, which is now ordered filed. The defendant moved the court to require the plaintiff to make its petition more definite and certain in the respects set forth in said motion; to which the plaintiff objected, and the court not being sufficiently advised thereof, takes time. The defendant further moved the court to strike out the second paragraph of the Amended Petition, filed herein on March 31, 1913, to which motion the plaintiff objected, and the defendant also filed a demurrer to the second paragraph of said Amended Petition filed March 31, 1913, and the court not being sufficiently advised in the premises, takes time.

Both the plaintiff and the defendant having announced ready to proceed with the hearing, the witnesses offered by the respective parties were heard, and there not being sufficient time to conclude the hearing of the testimony, it is ordered that this cause be passed until tomorrow morning for further hearing.

165

Amended Petition.

Filed January 19, 1916.

The plaintiff, the Western Union Telegraph Company, amends its petition herein and now states that, referring to the bridges alleged by the defendant in its amended answer as belonging to it.

As to the bridges over the Kentucky River at Ford, over the Kentucky River at Frankfort, over the Cumberland River at Pineville, over the Cumberland River at Williamsburg, over the Barren River at Bowling Green, and over the Licking River at Newport, the plaintiff has no fixtures or wires on any of said bridges, and does not seek to condemn the right to put any wires or fixtures on any of said bridges;

As to the bridges over the Kentucky River at Irvine, Heidelberg and Valley View, all three of these bridges are upon a line of road of the defendant which this plaintiff has, by an amended petition, withdrawn from this proceeding;

As to the bridges over the Kentucky River at Worthville, over the Green River at Munfordville, over the Green River at Livermore, over the Ohio River between Newport and Cincinnati, and over the Ohio River between Henderson and the Indiana State Line, this plaintiff has now, it is true, certain fixtures and wires on each of said bridges, but it does not desire to condemn any right to have the same there remain but withdraws all prayer in its original petition to the contrary purport.

Plaintiff states as before and prays as before, and for all proper relief.

RICHARDS & HARRIS.

166 *Motion to Require Plaintiff to Make Petition More Definite and Certain.*

Defendant, Louisville & Nashville Railroad Company, moves the court to require the plaintiff to make more definite and certain that portion of its petition and amended petitions herein, in which petitioner seeks to condemn the right to enter upon and over this defendant's right of way for the purpose of repairing, rebuilding and reconstructing its said line of telegraph by setting out and describing the various places where it seeks to condemn the right to enter upon defendant's right of way here involved, and by describing the widths or parts of its said rights of way which petitioner seeks to condemn for its use in entering upon and longitudinally traversing same for the purposes aforesaid.

**H. L. STONE,
HELM BRUCE,
E. S. JOUETT,**
Counsel for Defendant.

Demurres January 19, 1916, to Second Paragraph of Amended Petition.

Filed March 31, 1913.

The defendant demurs to the second paragraph of the plaintiff's amended petition, filed March 31, 1913, because:

1. It does not state facts sufficient to constitute a cause of action;
2. It does not state facts sufficient to support a cause of action.

**HELM BRUCE,
ED. S. JOUETT,
HENRY L. STONE,**
Attorneys for Defendant.

167 *Motion, January 19, 1916, to Strike Second Paragraph of Amended Petition.*

Filed March 31, 1913.

The defendant moves the court to strike out the second paragraph of plaintiff's amended petition filed March 31, 1913, because the matter thereof is irrelevant, and can not be considered for any purpose, either by the court or jury.

**HELM BRUCE,
ED. S. JOUETT,
HENRY L. STONE,**
Attorneys for Defendant.

Order, January 20, 1916, Sustaining Motion to Strike Second Paragraph of Amended Petition.

Filed March 31, 1913, and Tender of and Motion to File an Amended Answer to Petition.

Pending the consideration of the motion to strike out the 2d paragraph of the Amended Petition filed March 31, 1913, and the demurrer of the defendant to said 2d paragraph, the plaintiff appeared by counsel and withdrew its objection to the motion of the defendant to strike out said 2d paragraph, and it is now ordered that said motion be sustained, and said 2d paragraph of said amended petition be stricken out.

The defendant tendered an Amended Answer to the Petition herein as amended, to the filing of which the plaintiff objected, and the court not being sufficiently advised thereof, takes time to consider same. The hearing of the testimony offered by the respective parties was proceeded with, and there not being time to conclude the hearing of same, it is ordered that this cause be passed until tomorrow morning for further hearing.

168

Amended Answer.

Tendered and Offered to be Filed January 20, 1916.

The defendant, for amended answer herein, states that each and all the averments in the original petition as amended, stating and setting forth in substance that should the lands sought to be condemned herein, consisting of that portion of defendant's right of way on certain of its lines of railroad in the State of Kentucky, now and heretofore occupied by plaintiff, be taken and condemned for the purposes of a telegraph line of poles, wires and other fixtures, as proposed in the petition as amended, the plaintiff, in the event the defendant shall at any time desire to change the location of its tracks or to construct new tracks, or to construct new depots or other buildings, or to change the location of the same, where any of plaintiff's poles or wires are located upon defendant's right of way, will remove its said poles or wires at said points to any other part of defendant's right of way adjacent thereto, designated by defendant, upon due or reasonable notice in writing to that effect, at the expense of the plaintiff, are each and all promissory stipulations on the part of the plaintiff alone, which this defendant has not accepted and to which it does not assent, and defendant denies the right or power of the plaintiff to impose on the defendant such unaccepted promissory stipulations or agreements on the part of the plaintiff in respect to undertakings to be performed in the future, or subsequent to the time of the condemnation sought herein, and the said promissory stipulations on the part of the plaintiff to remove its telegraph line as aforesaid in the future, in case certain emergencies arise, can not operate to evade or avoid the present existing or future interferences by plaintiff's telegraph line with, or other obstructions to the ordinary use or the ordi-

nary travel and traffic on defendant's railroad or right of way, nor can the same be considered by the court or jury for the purpose of mitigating the damages to be awarded the defendant herein should condemnation of defendant's property be allowed or for any other purpose whatever.

The defendant further states that it is entitled to just compensation in money for the taking of its property and the other rights and easements sought to be acquired by plaintiff in this condemnation proceeding, and such compensation can not be dismissed by plaintiff's promissory stipulations aforesaid, or either of them.

Defendant states that the State statute under which this proceeding was instituted and is being prosecuted against defendant does not authorize or provide for the making of any such promissory
169 stipulations on the part of the plaintiff without the acceptance or assent of the defendant, and were the same allowed by the court herein, the taking of the defendant's property in pursuance of such stipulations, together with the right and easement to enter upon and over the right of way of the defendant for the purpose of repairing, rebuilding or reconstructing plaintiff's telegraph lines on and along defendant's right of way in the manner and for the purposes and upon the conditions and stipulations in the petition set forth and prayed for therein, would result in depriving this defendant of its property without due process of law, in violation of the provisions of Section 1, Article 14, of the Amendments to the Constitution of the United States.

Defendant states that said promissory stipulations, if valid at all for any purpose, which defendant denies, only provide for the removal of plaintiff's poles or wires from the portion of defendant's right of way that may be condemned herein upon the contingency that defendant shall desire to change the location of its tracks or to construct new tracks, or to construct new depots or other buildings, or to change the location of tracks, depots or other buildings, and then only to remove such poles or wires at said points to any other part of defendant's right of way adjacent thereto that may be designated by defendant, but if there be no other part of defendant's right of way adjacent thereto not already used, occupied or needed for the railroad purposes of the defendant, or which is available to plaintiff for making such removal, no removal of such poles or wires could be made, but they would have to remain stationary where they are now on the location herein sought to be condemned, although there are and will be many other essential railroad purposes to which the defendant may desire to put that particular portion of its right of way occupied by plaintiff's poles and wires, such as the location of its own telegraph, telephone, or automatic block signal poles, wires, and fixtures, interlocking plants, switch stands, borrow pits, quarries for ballast, or other important and material improvements for the safety and efficiency of its railroad service to the general public.

The defendant states the condemnation of its property, coupled with the proposed removal by plaintiff of its poles, wires and other fixtures in the contingencies stated, would unlawfully impose on

defendant the alternative, either, on the one hand, to make the exchange if there be another available location adjacent on one side or the other of defendant's right of way for plaintiff's telegraph line; or, on the other hand, to submit to the existing and future material interferences with and obstructions to the use of its right of way with respect to the construction of, or changes in, the location of tracks, depots, and other buildings thereon, as above mentioned, occasioned by the continued presence of plaintiff's telegraph line where the same is now located.

The defendant denies that plaintiff has the right, or the court has the power, under the law, to compulsorily take the defendant's property, or, in default of a designation and grant by defendant to plaintiff of another and different portion of defendant's right of way for the construction, operation and maintenance of a telegraph line, to subject defendant's railroad and right of way to such interferences and obstructions as are forbidden by law by the continued occupancy by the plaintiff of the location on defendant's right of way, where its telegraph line is now situated, or on the location which may be condemned herein, so long as defendant shall decline to make such exchange or to grant to plaintiff such other and different location on its right of way for plaintiff's telegraph line of poles, wires and other fixtures. The defendant avers that the condemnation which plaintiff seeks herein on such terms, conditions and promissory stipulations would deprive defendant of its property without just compensation, in violation of Article V of the Amendments to the Constitution of the United States, as well as of Sections 13 and 212 of the Constitution of the State of Kentucky, and would constitute a material interference with, and place a permanent burden upon, interstate commerce and the instrumentalities thereof, used by defendant in such commerce, in violation of the commerce clause of the Constitution of the United States.

Wherefore, defendant prays as in its original answer, that plaintiff's petition be dismissed with its costs, and for all other proper relief.

HELM BRUCE,
ED. S. JOUETT,
HENRY L. STONE,
Attorneys for Defendant.

171 *Order Concerning the Hearing of Evidence by the Court.*

January 21, 1916.

This cause again coming on for hearing the testimony offered by the respective parties was heard by the Court, and there not being sufficient time to conclude the hearing of same, it is ordered that this cause be passed until tomorrow morning for further hearing.

Order Concerning the Hearing of Evidence by the Court.

Entered January 22, 1916.

This cause again coming on for hearing the witnesses offered by the respective parties were heard and the hearing of the testimony concluded—and it is ordered that this cause be passed until Monday morning, January 24, 1916, for argument.

172 *Order Concerning Argument of Counsel on the Questions Submitted to the Court.*

January 24, 1916.

This cause again coming on for hearing was argued by Frank P. Strauss and A. P. Humphrey on behalf of the plaintiff, and Helm Bruce on behalf of the defendant, and the Court not being sufficiently advised, takes time to consider same.

Finding of Facts Separately from the Opinion

Filed January 29, 1916.

The Court having heard and considered the testimony offered by the parties respectively upon the two questions tried by it without a jury and submitted to its judgment on the 24th inst., and having also heard and considered the arguments for the respective parties, makes the following Findings of Fact: namely:

First. That there is a necessity for the taking by the plaintiff of the easement sought by it herein to be appropriated to plaintiff's use as described in its petition as amended; and,

Second. That such appropriation upon the location sought, and the erection, operation and maintenance in the usual manner of constructing, operating and maintaining telegraph lines on or along or upon the right of way of the defendant, in the manner and upon the location prayed for in the plaintiff's petition as amended, will not interfere with the ordinary use or the ordinary travel and traffic on defendant's railroad.

173 *Order January 29, 1916, in Pursuance of Opinion and Finding of Facts.*

This day came the parties by their respective counsel of record and the Court being fully advised of the questions heard by it without a jury and submitted to it on the 24th inst., delivered its opinion in writing thereon, which is filed, and also returned its separate Findings of Fact, which findings are now filed and made part of the record; and pursuant to said opinion and said Findings of Fact it is now considered and adjudged by the Court as follows:

First. That there is a necessity for the taking by the plaintiff of the easement sought by it herein to be appropriated to plaintiff's use as described in its petition as amended; and,

Second. That such appropriation upon the location sought, and the erection, operation and maintenance in the usual manner of construction, operating and maintaining telegraph lines on or along or upon the right of way of the defendant, in the manner and upon the location prayed for in the plaintiff's petition as amended, will not interfere with the ordinary use or the ordinary travel and traffic on defendant's railroad.

To all and to each part of which the defendant excepts.

The defendant, on motion of its counsel, is granted sixty days from this date within which to tender and file its Bill of Exceptions.

174 *Order on Defendant's Motion for View by the Jury of the Premises Sought to be Condemned.*

Filed January 31, 1916.

This day appeared the plaintiff by Henry L. Stone, Helm Bruce and E. S. Jonett, its counsel, and moved the Court as follows:

"The defendant moves the Court to send the jury, before the testimony of the witnesses shall be heard or at such time during the trial as may be deemed best or most convenient by the Court, in the custody of the Marshal and accompanied by such attorneys and representatives as the plaintiff and defendant respectively may select, under such instructions or admonitions as the Court may deem necessary or proper, to view in daylight the premises or rights of way of defendant's railroads in the State of Kentucky over which the plaintiff is seeking by this proceeding to condemn a right of way for the construction, operation and maintenance of its telegraph line thereon, or such of said rights of way as the Court may deem sufficient or fairly representative, in order that the Jury may see for themselves the said rights of way and the location of the plaintiff's line of telegraph poles, wires and other structures located on defendant's said rights of way and the topography of the ground or country through which defendant's said railroads run, and thus be enabled to better determine in their verdict, in connection with the testimony of the witnesses on the trial, the value of the land which will be taken and occupied by the plaintiff for its right of way if allowed to continue to operate and maintain its line of telegraph, poles, wires and other structures on and over the defendant's said rights of way sought to be condemned as aforesaid, and to estimate the value, in connection with the testimony of the witnesses on the trial, of the right and easement for plaintiff's employes to enter upon the defendant's said rights of way for the purpose of repairing, rebuilding and reconstructing its telegraph line and structures thereon, as well as to estimate the damages, if any, that will accrue to the remainder of the defendant's right of way for railroad

purposes by reason of the construction of such telegraph line upon such rights of way in the manner set out in the petition.

"The defendant hereby offers and undertakes, in the event the Court grants the foregoing motion, to furnish all necessary facilities, equipment and provisions for the transportation, board and lodging of the Jury, Marshal, attorneys and representatives of the parties while making the view of the premises or rights of way aforesaid, the expense which will be thus incurred in sending the jury out upon the premises or rights of way of the defendant, or such portions thereof as may be directed by the Court to make said view, to be borne by the plaintiff and defendant in such proportions as the Court may determine to be proper, at the close of the jury trial, the defendant, however, hereby expressing its willingness to bear the entire amount thereof in the event the plaintiff declines to bear any part of the same,"

and, in support of said motion, filed the affidavit of W. H. Courtenay, and the Court not being sufficiently advised thereof takes time.

Affidavit of W. H. Courtenay on Motion for View by the Jury.

Filed January 31, 1916.

The affiant, W. H. Courtenay, states he is Chief Engineer of the defendant company and has, in that capacity, frequently traveled over the railroad situated on the rights of way over which the plaintiff seeks to condemn the right to construct, operate and maintain its telegraph line in Kentucky.

He further states that he made an inspection trip over practically all of these lines on January 5, 6, 7 and 8, 1916, inclusive. Those he went over in daylight were as follows:

176 Main Stem;
 Lebanon Branch;
 Cincinnati Division;
 Kentucky Division;
 Knoxville Division;
 Cumberland Valley Division;
 Memphis Line;
 Owensboro & Nashville Division;
 Henderson Division.

In making this inspection trip the following itinerary was used:

January 5th.—Louisville to Mitchellville; Mitchellville to Guthrie via Memphis Junction; remained at Guthrie on the night of January 5th. Lines covered:

Main Stem First;
Main Stem Second;
Memphis Line.

January 6th.—Guthrie to Henderson; Henderson to Owensboro via L. H. & St. L.—Owensboro to Louisville via Russellville and Bowling Green. Remained at Louisville on night of 6th. Lines covered:

Henderson Division;
Owensboro & Nashville;
Main Stem First.

January 7th.—Louisville to Covington and Newport, then to Sinks; then to Middlesboro, remaining at Middlesboro during the night. Lines covered in daylight:

Cincinnati Division;
Kentucky Division—Covington to Sinks.

January 8th.—Middlesboro to Cumberland Gap; Cumberland Gap to Corbin; Corbin to Saxton; Saxton to Louisville. Lines covered:

Cumberland Valley Division;
Knoxville Division—Corbin to Saxton;
Kentucky Division—Corbin to Sinks;
Lebanon Branch.

177 The lines which were not covered in making this trip were—

Scottsville Branch;
Lexington Branch;
Shelby R. R. and Shelby Cut-Off;
Paris & Lexington Branch;
Paris & Maysville Branch;
Halsey Branch;
Middlesboro Railroad;
Clarksville & Princeton Branch;
Chenoa Branch;
Knoxville Division—Saxton to Jellico.

He further states that all of these lines, except the Scottsville Branch in Kentucky, the Halsey Branch, and the line from Saxton to Jellico, each of which is only a few miles in length, and comparatively unimportant, can be examined or inspected in daylight in five (5) days as follows:

First Day.—Louisville to Newport and Covington, then to Sinks (266 miles). Run from Sinks to Maysville during night. Lines covered in daylight:

Cincinnati Division;
Kentucky Division—Covington to Sinks.

Second Day.—Maysville to Paris; Paris to Lexington; Lexington to La Grange and back to Christiansburg; Christiansburg to Louisville via Shelbyville; Louisville to Middlesboro. Stay at Middles-

boro during night. Should be able to get to Lebanon before dark (267 miles in daylight). Lines covered in daylight:

Paris & Maysville Branch;
 Paris & Lexington Branch;
 Lexington Branch;
 Shelby Branch and Shelby Cut-Off;
 Lebanon Branch—possibly to Lebanon.

Third Day.—Middlesboro to Cumberland Gap and return; Middlesboro to Stony Fork Junction and return; Middlesboro to 178 Orby; Orby to Chenoa and return; Orby to Corbin; Corbin to Saxton and return; Corbin to Louisville (305 miles). Run from Louisville to Henderson over L., H. & St. L. and remain there during night. Should be able to see the Lebanon Branch in daylight to where dark overtakes party on second day. Lines covered in daylight:

Cumberland Valley Division;
 Middlesboro R. R.;
 Chenoa Branch;
 Knoxville Division—Corbin to Saxton;
 Kentucky Division—Corbin to Sinks;
 Lebanon Branch—probably Sinks to Lebanon.

Fourth Day.—Henderson to Gracey via Guthrie and Clarksville and run to Owensboro. Lay at Owensboro during night (279 miles). Lines covered in daylight:

Henderson Division;
 Clarksville & Princeton;
 Memphis Line—Guthrie to Russellville.

Fifth Day.—Owensboro to Mitchellville via Memphis Junction, run to Bowling Green and inspect to Louisville, 261 miles. Lines covered:

Owensboro & Nashville;
 Memphis Line—Russellville to Memphis Junction;
 Main Stem Second;
 Main Stem First.

He further states that the 4-day trip takes in the most important of these lines.

W. H. COURTENAY.

Subscribed and sworn to before me by said Courtenay this 25th day of January, 1916.

My commission expires on the 23d day of January, 1918.

[L. S.]

G. W. B. OLMSTEAD.

Notary Public, Jefferson County, Kentucky.

179 *Opinion on Motion to Direct the Jury to View the Right of Way.*

Filed February 8, 1916.

A motion made by the defendant is as follows:

"The defendant moves the court to send the jury, before the testimony of the witnesses shall be heard, or at such time during the trial as may be deemed best or most convenient by the court, in the custody of the Marshal and accompanied by such attorneys and representatives as the plaintiff and defendant respectively may select, under such instructions or admonitions as the court may deem necessary or proper, to view in daylight the premises or rights of way of defendant's railroads in the State of Kentucky over which the plaintiff is seeking by this proceeding to condemn a right of way for the construction, operation and maintenance of its telegraph line thereon, or such of said rights of way as the court may deem sufficient or fairly representative, in order that the jury may see for themselves the said rights of way and the location of the plaintiff's line of telegraph poles, wires and other structures located on defendant's said rights of way, and the topography of the ground or country through which defendant's said railroads run, and thus be enabled to better determine in their verdict, in connection with the testimony of the witnesses on the trial, the value of the land which will be taken and occupied by the plaintiff for its right of way if allowed to continue to operate and maintain its line of telegraph poles, wires and other structures on and over the defendant's said rights of way sought to be condemned as aforesaid, and to estimate the value in connection with the testimony of the witnesses on the trial, of the right and easement for plaintiff's employes to enter upon the defendant's said rights of way for the purpose of repairing, rebuilding and reconstructing its telegraph line and structures thereon, as well as to estimate the damages, if any, that will accrue to the remainder of the defendant's right of way for railroad purposes by reason of the construction of such telegraph line upon such right of way in the manner set out in the petition.

"The defendant hereby offers and undertakes, in the event the court grants the foregoing motion, to furnish all necessary equipment, facilities and provisions for the transportation, board and lodging of the Jury, Marshal, Attorneys and representatives of the parties while making the view of the premises or rights of way aforesaid, the expense which will be thus incurred in sending the jury out
180 upon the premises or rights of way of the defendant, or such portions thereof as may be directed by the court to make said view to be borne by the plaintiff and defendant in such proportions as the court may determine to be proper, at the close of the jury trial—the defendant, however, hereby expressing its willingness to bear the entire amount thereof, in the event the plaintiff declines to bar any part of the same."

In support of this motion it has filed the affidavit of its Chief Engineer.

Subsection 6, Section 4679c, Kentucky Statutes (being the Act of March 19, 1898), provides that "the jury shall not be required to go upon or view such right of way."

In dealing with the peculiar and unusual situation presented, the Legislature must be presumed to have had good reasons for the provision just quoted. Of course we cannot know what those reasons were, but it may not be a violent assumption to suppose that the Legislature considered that a railroad company might otherwise obtain a possible advantage. It alone could operate trains over its own track, and it could thereby have facilities for the pleasing entertainment of the jurors which would not be open to the other side. The right of way, parts of which are sought to be condemned in this proceeding, extends in Kentucky 1,062 miles. To obtain a casual and rapid transit view of the defendant's right of way and of the situation of the plaintiff's poles, wires and other structures thereon would require a good many days, during all of which the jury would be outside the court room and away from the court, and during which it is possible that the Legislature thought there might be created many wrong impressions upon one side or the other, which impressions might not have any relation to the statutory elements of recovery stated in the Act. Many other considerations might have been in the minds of the legislators which they deemed good reasons for the statutory provision referred to. But however these things may in fact be, the statute is explicit. We know of no reason why it should be overridden by the court.

It is insisted that the court has a discretion in the matter, and that the statutory provision, properly construed, does not mean to prohibit a view of the premises by a jury, but only that the jury shall not be "required" to go upon or view the right of way. We hardly read the statute that way, but accepting that as a correct construction

of it, we nevertheless conceive it to be our duty to overrule the
181 motion because we think it would not be a wise or proper exercise of any discretion which the court may have in the premises. If the Legislature had in mind any reasons in any way kindred to those we have imagined might be imputed to it, we think they apply as aptly to the court's discretion as they did to the legislative mind.

It is also suggested that the provision may deny to defendant some constitutional right. This is not quite in harmony with the other suggestion, because no constitutional right can be dispensed with by any exercise of judicial discretion. A constitutional right could not thus be frittered away. We think there is no constitutional provision which would prevent either the enactment of the statute or the exercise of any discretion we might have under its provisions. It is, however, a somewhat fundamental view that both parties to a litigation have the right, first, to have all testimony delivered under oath; second, that it be delivered in open court in the presence of both sides, who will thus be confronted with the witnesses; and, third, that both sides have an opportunity to raise the question of whether the

testimony offered is pertinent to the issues involved in the case. These propositions might be denied or forgotten if the jury were permitted to spend a week in such a journey as that proposed in the defendant's motion.

While it is true that in some cases jurors may be permitted to view certain premises, they rarely get so far from the court in such instances as to make it probable that they can do more than obtain an exact knowledge of a locality.

Viewing the questions involved from any standpoint, we think the motion should be, accordingly it is, overruled and denied.

February 8, 1916.

WALTER EVANS,

Judge.

182 *Order Renewing Motion for View by the Jury and Overruling the Same.*

February 8, 1916.

This day appeared the defendant by Henry L. Stone, its counsel, and renewed its motion entered herein January 31, 1916, to take the jury over the premises, and the court now being sufficiently advised, delivered an opinion in writing, which is filed—and pursuant thereto it is ordered, considered and adjudged that said motion be, and it is overruled.

Order Filing Amended Petition, Impanelling Jury, and Statement of Case by Counsel.

February 8, 1916.

This cause coming on this day for hearing the plaintiff tendered an Amended Petition which was ordered filed. Both the plaintiff and defendant having announced ready for trial a jury composed of the following persons: J. Henry Amshoff, J. P. Bozarth, William Hewitt, Charles E. Wiley, Jacob J. Hubbuch, Isaac T. Woodson, Jacob Bornstein, G. E. Haydon, Ewing Crenshaw, J. C. Hobby, Alfred E. Figg and John L. Gruber were duly elected, impaneled and sworn "that you and each of you as a member of this jury will a true verdict render in this cause, assessing for the defendant the actual cash value of so much of its land as may be shown by the proof will be actually taken and occupied by the petitioner, and such other incidental damages, if any, as shown by the proof will accrue to the remainder of the right of way for the purpose for which it is held by the defendant by reason of the construction of petitioner's telegraph line in the manner set out in the petition, so help you God."

The cause was stated to the jury by counsel for the respective parties, the evidence heard, and there not being sufficient time to conclude same, it is ordered that this cause be continued until tomorrow, February 9, 1916, for further hearing.

Amended Petition.

Filed February 8, 1916.

The plaintiff, the Western Union Telegraph Company, further amends its petition herein for the purpose of excluding from its prayer the appropriation of a right of way along the following additional lines of the defendant, the Louisville & Nashville Railroad; that is to say:

1. The right of way described in Paragraph 4 of its original petition, being the right of way of said Railroad Company from Scottsville, in Allen County, Kentucky, to the State Line, commonly known as the Chesapeake & Nashville Branch, and the spurs and branches thereof, containing approximately 9.9 miles.

2. The right of way described in Paragraph 6 of its original petition, being the right of way of said Railroad Company running from a point at or near its station at the town of Gracey in Christian County, Kentucky, to the State line, commonly known as Clarksville & Princeton Branch, and the spurs and branches thereof, containing approximately 23.17 miles.

3. The right of way described in Paragraph 9 of its original petition herein, being the right of way of said Railroad Company from a point at or near the station of said Railroad Company in the town of Wasioto, in Bell County, Kentucky, to a point at or near the station of said Railroad Company at Chenoa in said Bell County, commonly known as the Chenoa Branch, and the spurs and branches thereof, containing approximately 12.32 miles.

4. The right of way described in Paragraph 15 of its original petition, being the right of way of said Railroad Company beginning at or near the station of said Railroad Company in the town of Paris, County of Bourbon, Kentucky, and running to the town of Maysville, County of Mason, Kentucky, this being commonly known as the Paris & Maysville Branch of said Railroad Company, and the spurs and branches thereof, containing approximately 49.4 miles.

5. The right of way described in Paragraph 17 of its original petition, being the right of way of said Railroad Company beginning at or near the station of said Railroad Company at Halsey, in Whitley County, Kentucky, and running to the State line, being commonly known as the Halsey Branch, and the spurs and branches thereof, containing approximately 8.1 miles.

6. A portion of the right of way described in Paragraph 23 of its petition, being a part of what is described in said paragraph as the Owensboro & Nashville Railway, and being that part of said right of way running from Russellville, in Logan County, Kentucky, to Adairville, in Logan County, Kentucky, and the spurs and branches thereof, containing approximately 12 miles.

7. That portion of the right of way of said Railroad Company described in Paragraph 27 of its original petition as the Stony Fork Branch, containing approximately 2.84 miles, the petition, by mistake, having alleged the length of this right of way to be about 1.84 miles.

The plaintiff herewith withdraws its application for condemnation of right of way upon the right of way of the said Louisville & Nashville Railroad Company as above described, in addition to its withdrawals heretofore made.

Plaintiff prays as before, and for all proper relief.

STRAUS, LEE & KRIEGER,

HUMPHREY, MIDDLETON & HUMPHREY,

RICHARDS & HARRIS,

Attorneys for Plaintiff.

Order Concerning Jury Trial.

February 9, 1916.

This cause again coming on this day for hearing, the court delivered an opinion in writing, which is now ordered filed. The jury appeared and the hearing of the evidence offered was proceeded with and there not being sufficient time to conclude the hearing of the evidence it is ordered that this cause be continued until tomorrow, February 10, 1916, for further hearing.

(The above-mentioned opinion will be found copied in Bill of Exceptions No. 2, R., pages 160-170.)

185

Order Concerning Jury Trial.

February 10, 1916.

This cause coming on again this day for hearing, the jury appeared and the evidence was heard in part and there not being time to conclude the hearing of same, it is ordered that this cause be continued until tomorrow, February 11, 1916, for further hearing.

Order Concerning Jury Trial.

February 11, 1916.

This cause coming on again this day for hearing the jury appeared and the evidence was heard in part, and there not being time to conclude the hearing of same it is ordered that this cause be continued until Monday, February 14, 1916, for further hearing.

Order Concerning Jury Trial.

February 14, 1916.

This cause coming on again this day for hearing, the Jury appeared and the evidence was heard in part, and there not being time

conclude the hearing of same, it is ordered that this cause be continued until tomorrow, February 15, 1916, for further hearing.

Order Concerning Jury Trial.

February 15, 1916.

This cause coming on again this day for hearing the Jury appeared, and there not being sufficient time to conclude the hearing of the cause it is ordered that same be passed until tomorrow, February 16, 1916.

Directed Verdict of Jury.

Returned February 16, 1916.

This cause coming on again this day for hearing the Jury heretofore impaneled and sworn appeared, and, after being instructed by the Court, returned a verdict as follows:

"We, the jury, assess the damages and just compensation to be paid the Louisville and Nashville Railroad Company by the Western Union Telegraph Company to be five thousand dollars.

G. L. HAYDON,

One of the Jury."

Judgment Entered February 16, 1916, to Reverse Which Writ of Error Is Prosecuted.

In this case the claim of the Western Union Telegraph Company to have condemned to its use the right to construct, maintain and operate its lines of telegraph upon the right of way of the defendant, the Louisville & Nashville Railroad Company, in this State in the manner hereinafter described was submitted on February 16, 1916, to the jury heretofore impaneled and sworn herein, and said jury on the same day, under the Court's instruction, returned a verdict as follows:

"We, the jury, assess the damages and just compensation to be paid the Louisville and Nashville Railroad Company by the Western Union Telegraph Company to be five thousand dollars.

G. L. HAYDON,

One of the Jury."

The right of way of the Louisville & Nashville Railroad Company above referred to is as follows:

Miles.

Main Stem, Louisville to Tennessee State Line 139.33

For a part of this distance there is at present a line of telegraph on both sides of the right of way, but where this is the case this judgment is to apply only to the west side of the right of way.

Lebanon Branch, Lebanon Junction to Sinks	107.1
Cincinnati Division, Louisville to Newport	106.7
Lexington Branch, La Grange to Lexington	65.7
Shelby Branch and Shelby Cut-off—Anchorage to Christiansburg	27
Kentucky Division, Covington to Corbin	184.1
Paris & Lexington Branch, Paris to Lexington	17.6
Knoxville Division, Corbin to Tennessee State Line and Saxton to Jellico	32.9
Cumberland Valley Division, Corbin to Virginia State Line	46.7
Memphis Line, Memphis Junction to Guthrie	46.5
Owensboro & Nashville Division, Russellville to Owensboro	71.4
Henderson Division, Guthrie to Henderson	97.7
Total mileage	942.83

It is adjudged that the petitioner is to have the right perpetually to construct, maintain and operate its lines of telegraph consisting of poles, wires and fixtures over, upon and along said right of way above described, and to occupy said right of way, including bridges (subject to the exceptions hereinafter stated), tunnels, trestles and viaducts of the defendant, Railroad Company, now occupied by the petitioner with its poles, wires and appurtenances and to maintain and operate its said line of telegraph where now placed and located, or hereafter constructed, subject to such change of location in said right of way as the necessities of the Railroad Company may require, together with a right and easement on the part of the Western Union Telegraph Company to enter on and over said right of way and above described structures of said Railroad Company for the purpose of maintaining, rebuilding or reconstructing the said telegraph line along the same.

It is, however, provided that the following bridges over which the plaintiff has now no telegraph lines are excluded herefrom, viz:

- (1) Bridge over the Kentucky River at Fords.
- (2) Bridge over the Kentucky River at Frankfort.
- (3) Bridge over the Cumberland River at Pineville.
- (4) Bridge over the Cumberland River at Williamsburg.
- (5) Bridge over the Barren River at Bowling Green.
- (6) Bridge over the Licking River at Newport.

It is further provided that this judgment shall not apply to the following bridges over which the plaintiff now has its lines, to-wit:

- (7) Bridge over the Kentucky River at Worthville.
- (8) Bridge over Green River at Munfordville.
- (9) Bridge over Green River at Livermore.
- (10) Bridge over the Ohio River between Newport and Cincinnati.

(11) Bridge over the Ohio River between Henderson and the Indiana State Line.

It is further adjudged as follows:

That in any removal or reconstruction of said telegraph line no more land along the right of way of the defendant Railroad Company shall be used than that now occupied by the petitioner.

That the Railroad Company shall have the right to take from that part of the right of way over which the wires of the petitioner may be strung, all the dirt, gravel, sand, stone, water and other materials of every kind and character that the railroad company

189 may need from time to time—and in the event said right of way is cut down or the grade thereof changed in any manner, the petitioner is to reset its poles and its wires at its own expense, upon due and reasonable notice in writing to that effect, so as to make them conform to such new grade; and said poles shall not be so set as to interfere with any ditch, drain or culvert or other work or structures of the defendant.

That in the event the defendant Railroad Company shall at any time desire to change the location of its tracks, or to construct new tracks, or to construct new depots or other buildings, or to change the location of same where any of the petitioner's poles or wires are located upon its right of way, the petitioner shall remove its said poles and wires at said points to any other part of the defendant's right of way adjacent thereto designated by the defendant, upon due and reasonable notice in writing to that effect, and at the expense of the petitioner.

That the petitioner shall assume all the risks of its poles, wires, insulators and cross-arms, and shall hold the defendant, the Louisville & Nashville Railroad Company, harmless from any damage to any of the petitioner's property occasioned by the burning of grass or undergrowth upon said railroad right of way; and said petitioner shall have no right to fence any of said right of way nor in any manner to exclude the defendant therefrom.

That upon payment of the above award, either to the defendant, Louisville & Nashville Railroad Company, or to the Clerk of this court, and all costs in this behalf expended by the defendant, the petitioner, the Western Union Telegraph Company, may continue in the occupancy of said property of the defendant Railroad Company, and continue to appropriate so much thereof as is above described.

Unless the petitioner shall pay the amount of said award and costs as aforesaid on or before the 1st day of June, 1916, the petitioner shall be deemed and considered to have abandoned this proceeding to condemn the property and rights above described, over, on and along the said railroad rights of way of the defendant for the construction, operation and maintenance of a telegraph line thereon, and all rights thereto acquired under this judgment shall be deemed and considered to have been forfeited by the petitioner and the de-

190 hereby adjudged, its costs herein expended, for which execution may issue.

That in the event the Western Union Telegraph Company shall pay the amount of said award to the Clerk of this court, then the Clerk of this court shall mail written notice of these proceedings and of the award to the Trustees hereinafter named in the mortgages set out in the answer of the defendant herein, to-wit:

Central Trust Company of New York, Trustee under mortgage dated June 1, 1880.

Central Trust Company of New York, Trustee under mortgage dated June 2, 1890.

United States Trust Company, Trustee under mortgage dated April 30, 1887.

Mercantile Trust Company of New York, Trustee under mortgage dated November 1, 1881, executed by Louisville, Cincinnati & Lexington Railway Company.

United States Trust Company of New York, Trustee under mortgage dated April 1, 1905.

Central Trust Company of New York, Trustee under mortgage dated December 6, 1879, executed by Evansville, Henderson & Nashville Railroad Company.

Metropolitan Trust Company of New York, Trustee under mortgage dated July 1, 1887, executed by Kentucky Central Railway Company.

Central Trust Company, Trustee under mortgage executed by Owensboro & Nashville Railroad Company, dated November 1, 1881.

The payment of the amount of said award shall not be made by the petitioner to the Clerk of this court if the defendant shall obtain and file with him on or before the 15th day of May, 1916, written releases or waivers by the Trustees aforesaid of their right or claim to have the amount of said award, or any part thereof, paid to the Clerk of this court, and consenting that the same may be paid to the defendant.

To all the foregoing judgment the defendant, Louisville & Nashville Railroad Company, excepts.

That execution of this judgment is suspended until April 5, 1916 in order to give to each party time in which to file a petition for a new trial; and time is given to each of the parties until June 1, 1916 to tender a Bill of Exceptions herein.

191 *Order Paying Amount of Judgment and Costs into Court.*

March 8, 1916.

This day came the Western Union Telegraph Company and paid into the registry of the court in this cause the sum of sixty-eight hundred and twenty-five dollars and twenty-six cents (\$6,825.26) the amount of the judgment entered herein February 16, 1916, and costs.

Order Extending to Defendant Time 30 Days for Tendering and Filing of Bill of Exceptions Pertaining to Trial by the Court.

Entered March 25, 1916.

With the consent of both parties hereto, it is ordered that the time heretofore allowed defendant by the order of January 29, 1916, for tendering and filing its bill of exceptions pertaining to the trial by the Court without a jury is hereby extended thirty days from the time when it would otherwise have expired.

192 *Order Nunc Pro Tunc.*

Entered April 15, 1916.

The motion of the defendant entered herein on January 19, 1916, to require the plaintiff to make its petition more definite and certain in the respects set forth in said motion, and the motion of the defendant to file its amended answer tendered herein on January 20, 1916, having been at the time taken under advisement, the court thereafter on January 29, 1916, overruled each of said motions, to which the defendant excepted; and it appearing that this order of the Court was not entered of record, the same is ordered to be entered nunc pro tunc.

Order April 15, 1916, Filing Assignment of Errors and Tendering Bills of Exceptions Nos. 1 and 2, with Exhibits; Motion that Court Settle, Sign and Make the Same Part of the Record; and Extension of Time Therefor Till June 1, 1916.

This day came the defendant and filed its Assignment of Errors; and thereupon tendered its Bill of Exceptions No. 1 with the Exhibits made part thereof, and its Bill of Exceptions No. 2 with the Exhibits made part thereof, and moved the Court to settle, sign and make part of the record herein its said Bills of Exceptions, and time is hereby given by the Court to counsel for plaintiff until June 1, 1916, to present objections to said bills, if any such they shall have.

It is further ordered that time for settling and filing the Bill of Exceptions pertaining to the trial by the Court without a jury be, and is hereby, extended to and including June 1, 1916.

193 *Order Extending Time Until and Including June 15, 1916, for Filing Bills of Exceptions.*

Entered May 31, 1916.

With the consent of both parties hereto, it is ordered that the time for approving and filing defendant's Bills of Exceptions herein is hereby extended to and including June 15, 1916.

*Order Extending Time Until and Including June 22, 1916, for
Filing Bills of Exceptions.*

Entered June 15, 1916.

This day came the parties hereto, by counsel and tendered a stipulation in words and figures as follows, to-wit:

"With the consent of both parties hereto, it is ordered that the time for approving and filing defendant's Bills of Exceptions herein is hereby extended to, and including, June 22, 1916.

H. L. STONE,
E. S. JOUETT,
HELM BRUCE,
For Defendant.

HUMPHREY, MIDDLETON &
HUMPHREY,
For Plaintiff."

which is now ordered filed, and pursuant thereto it is considered, ordered and adjudged by the Court that the time for approving and filing defendant's Bills of Exceptions herein be, and is, extended to, and including, June 22, 1916.

June 15, 1916.

194 *Order Filing Bills of Exceptions Nos. 1 and 2.*

Entered June 22, 1916.

This day came the plaintiff by its counsel, A. E. Richards and Alex. P. Humphrey, and the defendant by its counsel, Helm Bruce and Henry L. Stone, and thereupon the matter of settling the Bills of Exceptions heretofore tendered by the defendant coming on to be heard and determined, the counsel for the plaintiff having examined said Bills of Exceptions and suggested certain changes therein, and the Court being fully advised now, after certain changes were made therein, settles said Bills of Exceptions Nos. 1 and 2, together with the exhibits made part thereof, respectively, and approved and signed each of said Bills of Exceptions, and order and directed that the same be and they are hereby filed and made part of the record herein.

195 *Order Allowing Writ of Error.*

Entered June 29, 1916.

This 29th day of June, 1916, came the defendant by its attorneys and filed herein, and presented to the court, its petition, praying for the allowance of a writ of error, an assignment of errors intended to be urged by it, having heretofore been filed herein; praying, also,

that a transcript of the record and proceedings and papers, upon which the judgment herein was rendered on February 16, 1916, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the writ of error upon the defendant giving bond according to law in the sum of five hundred dollars; said bond not to operate as a supersedeas.

Thereupon the defendant, with the Royal Indemnity Company as surety, executed bond in the sum and as required by the foregoing order, which bond and surety are approved by the court.

196

Bond on Writ of Error.

Approved June 29, 1916.

Know All Men by These Presents:

That we, the plaintiff in error, Louisville & Nashville Railroad Company, as principal, and the Royal Indemnity Company, as surety, are held and firmly bound unto the defendant in error, Western Union Telegraph Company, in the full and just sum of five hundred dollars, to be paid to the said defendant in error, its certain attorneys, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals, and dated this the 29th day of June, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately, to wit: on February 16, 1916, at a District Court of the United States for the Western District of Kentucky, in a suit pending in said court between Western Union Telegraph Company, plaintiff, and Louisville & Nashville Railroad Company, defendant, a judgment was rendered against the said Louisville & Nashville Railroad Company, and the said Louisville & Nashville Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said Western Union Telegraph Company, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the city of Cincinnati, in said Circuit, on the 29th day of July, next.

Now, the condition of the above obligation is such, that if the said Louisville & Nashville Railroad Company shall prosecute said Writ of Error to effect and answer all costs, if it fails to make the said plea good, then the above obligation is to remain in full force and virtue.

Sealed and delivered in the presence of—

E. S. LOCKE,

C. J. WEIS.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY,

By M. H. SMITH,

President.

[SEAL.]

ROYAL INDEMNITY COMPANY,

By HENRY G. BEDINGER,

Atty. in Fact,

Surety.

Approved:

WALTER EVANS,

Judge.

197

Writ of Error.

Issued June 29, 1916.

The United States Circuit Court of Appeals for the Sixth District.

UNITED STATES OF AMERICA,

Sixth Judicial Circuit, ss:

The President of the United States to the Honorable Judge of the District Court of the United States for the Western District of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you, between Western Union Telegraph Company, plaintiff, and Louisville & Nashville Railroad Company, defendant, a manifest error hath happened, to the great damage of the said Louisville & Nashville Railroad Company, defendant, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at the City of Cincinnati, in said Circuit, on the 29th day of July next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this the 29th day of June, A. D., 1916, and in the

one hundred and fortieth year of the independence of the United States of America.

Allowed by
WALTER EVANS,
U. S. District Judge.

Attest:
[SEAL.] A. G. RONALD,
*Clerk of the District Court of the
United States for the Western
District of Kentucky.*

198 *Order Filing Mandate.*

Entered December 7th, 1918.

This day came the defendant, Louisville & Nashville Railroad Company, by its counsel, Henry L. Stone and Helm Bruce, and also came the plaintiff, Western Union Telegraph Company, by its counsel, A. E. Richards and A. P. Humphrey, and thereupon the defendant, by its said counsel, tendered, and with leave of the Court filed and made part of the record herein, a printed copy of the opinion of the Circuit Court of Appeals for this circuit, delivered on May 8, 1918, on writ of error to this Court.

The defendant by its said counsel also tendered, and thereupon was filed herein, the mandate of said Circuit Court of Appeals as certified by the Clerk thereof, the mandatory parts of which are as follows:

"And, whereas, in the present term of October, in the year of our Lord, one thousand nine hundred and seventeen, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and the same is hereby reversed with costs and the cause remanded with direction to award a new trial.

You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding."

And it appearing therefrom that the judgment of this Court heretofore rendered in this action has been reversed and annulled by the Circuit Court of Appeals, it is now ordered that this action be and it is restored to the Docket of this court to the end that a new trial thereof shall be had in accordance with the mandate and opinion of the said Circuit Court of Appeals.

199 *Motion to Set Aside Order of December 7th, 1918.*

Filed December 19, 1918.

This day appeared the defendant, Louisville & Nashville Railroad Company, by H. L. Stone and Helm Bruce, its counsel, and moved the Court as follows:

"Defendant, Louisville & Nashville Railroad Company, moves the Court to set aside the following portion of the order entered herein on December 7, 1918, to wit:

'And it appearing therefrom that the judgment of this Court heretofore rendered in this action has been reversed and annulled by the Circuit Court of Appeals, it is now ordered that this action be and it is restored to the Docket of this Court to the end that a new trial thereof shall be had in accordance with the mandate and opinion of the said Circuit Court of Appeals.'

And in lieu thereof to make the following order as tendered by defendant on said date, to wit:

'Now, therefore, in conformity with said opinion and mandate, it is now ordered and adjudged by the court that the Findings of Fact made by this Court on Jan'y. 29, 1916, and the order of the Court of that date, based thereon, and the verdict of the jury returned herein on Feby. 16, 1916, and the judgment of the Court of that date, be, and they are hereby, set aside and held for naught.'

And as grounds for the foregoing motion, defendant states:

1. That the order as entered by the Court is not in conformity with the opinion and mandate of the Circuit Court of Appeals, whereas the order tendered by defendant is in conformity therewith.

2. That defendant has not been heard on the question of the proper form of said order as the Court, on account of other engagements, was not able to hear the parties as to the proper form of said order on the day it was tendered by defendant, and announced that it would hear the parties thereon at a later day; the motion to enter said order not being then submitted.

H. L. STONE,
HELM BRUCE,
Attys. for Deft."

The motion was argued by Helm Bruce on behalf of the defendant and the Court not now being sufficiently advised thereof takes time to consider same.

200 *Opinion on Motion to Amend Order Filing Mandate.*

Entered Dec. 21, 1918.

EVANS, J.:

The argument of the defendant's counsel on the motion made on the 19th inst. has taken such range as seems to make it appropriate thus to state our views thereon, although we cannot attach much importance to the motion itself.

The mandate sent down by the Circuit Court of Appeals is in this language:

"And whereas, in the present term of October, in the year of our Lord, one thousand nine hundred and seventeen, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel.

"On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and the same is hereby reversed with costs and the cause remanded with direction to award a new trial.

"You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding."

When a writ of error seeking the reversal of a judgment rendered by a trial court is perfected, the action is thereby transferred to the Appellate Court. When that court has acted it is altogether necessary that its ruling should be certified to the trial court and put upon the record there. This is done by filing in the trial court the authenticated mandate of the Appellate tribunal, and if that requires a new trial of the action in the way pointed out in an opinion of that court, a copy of that opinion must also be filed, thus completing up to date the record of the proceedings in the case. All this has been done in this instance, and shows precisely what this court

is required to do, namely, to award a new trial of the action, 201 and in that new trial to proceed in conformity with the opinion of the Circuit Court of Appeals. The first step in that process is to restore the case to the Docket—that is to say, to put it on the list of cases to be tried in due course. That trial must be a trial de novo, and must proceed upon the issues made precisely as if no former hearing had taken place, except that the opinion of the Circuit Court of Appeals is now the law of the case by which all motions and other steps and proceedings must be controlled. This all seems trite enough, but the defendant's motion now under consideration seems to claim that the court shall decide at this time at least one question which should not come up now but at the next trial of the case.

The Circuit Court of Appeals did not direct this court to reverse its previous judgment, but itself did it, as the mandate filed ex-

plicitly shows. Hence there is neither necessity for nor propriety in entering any superfluous order in this court reversing its former judgment. That had already been done by higher authority. What the mandate of the higher court did was to direct a new trial of this action, the same to be conducted pursuant to the opinion filed. That opinion thus becomes our authoritative guide in the new trial, which has been awarded as directed. This, plainly, is all the mandate itself calls for. However, the defendant has moved to insert in the order filing the mandate a certain part of the opinion of the court, but we think there is no more occasion for that than there would be for the insertion in the order under consideration of every other rule laid down in that opinion. The duty of the court during the new trial will be to follow implicitly the directions given for our guidance in the opinion of the Circuit Court of Appeals.

202 It seems clear, therefore, that the order entered in the case on the 7th inst. is entirely adequate and fully meets the present situation. The case was thereby restored to the Docket and a new trial was awarded the defendant as required by the mandate. What shall be done in the new trial will depend entirely upon what questions are presented by the respective parties, though as far as such questions have been ruled upon by the Circuit Court of Appeals that ruling must be followed.

It should be remembered that in the case of *Slocum v. New York Life Ins. Co.*, 228 U. S. at page 399, the Supreme Court said: "The reversal operated to set aside the verdict and to put the issues at large, as they were before it was given." In that case the Circuit Court of Appeals, instead of ordering a new trial before a jury as seemed to be demanded by the seventh amendment to the Constitution, as frequently construed, and especially in *Capital Traction Co. v. Hof*, 174 U. S. 13, examined the evidence and itself directed a judgment. This was held to be error, and the Supreme Court having so ruled, made the observation just quoted. The Circuit Court of Appeals in this case made no such direction, but remanded the case with directions to award a new trial. It did not undertake to say in advance anything about what might be proved or what weight should be given to any fact which might be developed at the new trial, thus leaving the issues of fact at large, though during the new trial this court's ruling upon every question which the Circuit Court of Appeals has decided must be industriously and carefully ascertained and followed; but this court, at this stage, can not anticipate what questions the parties respectively will raise or have the right to raise, so as to have the benefit of rulings upon all of them, and the court should not cut them off from that right. Of course if the

findings of fact by the trial court in the previous trial on
203 the subject of the necessity for the condemnation should be brought up in proper form it would be the duty of this court then to rule upon that question precisely as directed by the Circuit Court of Appeals. But to say now, at this stage, that nothing of that sort shall appear in the record is not demanded by anything that the Circuit Court of Appeals has ruled. We repeat that the mandate in terms limits what we are to do at this stage to the awarding of a

new trial. During that new trial we are to follow the law of this case as laid down in the opinion, but this is not the time nor the occasion for determining any of the questions thus to be raised or presented. Non constat that they will be raised at all.

Both in their oral argument and in their brief counsel for defendant insist that the word "must" which the Circuit Court of Appeals used in its opinion in connection with the reversal of the judgment, when it said that the judgment must be reversed and the finding of facts set aside is mandatory and should be acted upon now. That, however, was only its manner of stating the conclusions of the court. It was made no part of the mandate issued by the clerk. It referred only to what the court was then doing, and said in effect that because of errors the judgment "must" be reversed, and the findings of fact (a part of that judgment) held for naught. It is a quite usual form of expression in opinions, but it was not meant to constitute any part of the mandate which, having come down in due form, speaks for itself. We, therefore, hold that all the rulings upon any questions which may come up during the new trial which has been awarded must be made then and not anticipated now for the advantage or detriment of either side. The regular way in such a proceeding is at the time to let each side present any motions or objections which they may think proper and

204 let the court pass upon them then, subject always to the provisions that if the Circuit Court of Appeals has ruled upon that question, the orders of this court during the new trial must conform to that opinion. The court is therefore clearly of opinion that the motion made on the 19th to set aside a specified part of the order entered on December 7th, and to substitute therefor other matter, should be overruled. The order entered on the 7th fully conformed to the mandate by awarding the defendant a new trial and restoring the case to the docket for that purpose.

An order will be entered overruling the motion made on the 19th to amend the order entered on the 7th inst., with exceptions to the defendant.

205

Order Overruling Motion.

Entered Dec. 21, 1918.

EVANS, J.:

This Court being now sufficiently advised of the questions arising on the motion of the defendant made herein on yesterday to strike out of the order entered in this cause on the 7th inst. the words:

"And it appearing therefrom that the judgment of this court heretofore rendered in this action has been reversed and annulled by the Circuit Court of Appeals, it is now ordered that this action be and it is restored to the Docket of this Court to the end that a new trial thereof shall be had in accordance with the mandate and opinion of the said Circuit Court of Appeals,"

And in lieu thereof to insert the words:

"Now, therefore, in conformity with said opinion and mandate, it is now ordered and adjudged by the Court that the Findings of Fact made by this Court on Jan'y. 29, 1916, and the order of the Court of that date, based thereon, and the verdict of the jury returned herein on Feby. 16, 1916, and the judgment of the Court of that date, be, and they are hereby, set aside and held for naught."

Delivered its opinion in writing thereon, which is filed. Pursuant to said opinion it is now ordered and adjudged by the Court that the said motion should be and it is denied and overruled, to which the defendant excepts.

206

Copy of Order.

Filed February 15, 1919.

United States Circuit Court of Appeals for the Sixth Circuit.

No. 3266.

In re LOUISVILLE & NASHVILLE RAILROAD COMPANY, Petitioner.

The motion of the Louisville & Nashville Railroad Company for a rule on the Honorable Walter Evans, United States District Judge for the Western District of Kentucky, to show cause why he should not enter a certain proposed order pursuant to our mandate in Louisville & Nashville Railroad Company, Plaintiff in Error, v. Western Union Telegraph Company, Defendant in Error, No. 2952, coming on to be heard upon the motion papers, and;

It appearing therefrom that such mandate issued in a proceeding taken by writ of error to revise a judgment at law in the court below, which judgment was reversed by this court; that such judgment of reversal necessarily, unless otherwise specified, operates to vacate not only the judgment below but also any finding or verdict upon which the same may be based, and to leave the action for new trial as if no finding or verdict had been made; that in such cases at law there is no necessity for any order in the court below formally vacating the former proceedings; and that in this case there is no reason to anticipate that the District Judge intends to or will give any further force or effect to such finding or verdict.

Ordered; that leave to file the petition be granted; that the motion for rule to show cause be denied; and that the petition be dismissed.

United States Circuit Court of Appeals for the Sixth Circuit.

* I, Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the order entered Feb. 7, 1919, denying

motion for rule to show cause and dismissing petition of Louisville and Nashville Railroad Company for writ of mandamus against Honorable Walter Evans, U. S. District Judge for the Western District of Kentucky, in case No. 3266, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 7th day of February, A. D., 1919.

[SEAL.]

ARTHUR B. MUSSMAN,
Clerk of the United States Circuit
Court of Appeals for the Sixth Circuit.

207 *Order, Entered February 15, 1919, Filing Amended and Supplemental Answer.*

This day appeared the defendant, Louisville & Nashville Railroad Company, by Helm Bruce and Henry L. Stone, its counsel, and tendered an Amended and Supplemental Answer herein, which is now ordered filed.

208 *Amended and Supplemental Answer.*

Filed February 15, 1919.

Defendant Louisville & Nashville Railroad Company for amended and supplemental answer herein says that by an Act entitled "An Act to protect Railroad Companies in the use and enjoyment of their rights of way by forbidding the condemnation thereof for other purposes," approved March 14, 1916, the General Assembly of the Commonwealth of Kentucky, enacted as follows (Session Acts 1916, Chapter 15, pp. 69-70; See, 840a, Vol. 3, Ky. Stats., Carroll's Ed. 1918), viz:

"Sec. 1. That no part of the right of way of any railroad company, or any interest or easement therein, shall be taken by any condemnation proceedings, or without the consent of such railroad company, for the use or occupancy of any part of such right of way, on, over, and along such right of way longitudinally, by any telegraph, telephone, electric light, power, or other wire company, with its poles, cables, wires, conduits, or other fixtures; provided, that nothing in this section shall be construed as preventing any such wire company from obtaining the right to cross the right of way of a railroad company, under existing laws in such manner as not to interfere with the ordinary use or ordinary travel and traffic of such railroad company's railroad.

209 "Sec. 2. That all acts and parts of acts in conflict with this act be and the same are hereby repealed."

The session of said General Assembly, at which said Act was passed, finally adjourned on the 14th day of March, 1916, and said Act, under the provisions of Section 55 of the Constitution of the

State of Kentucky, became a law ninety (90) days after such adjournment, to wit: on the 12th day of June, 1916, and said Act has since been and is now a law of this State and in full force and effect.

And thereby said General Assembly forbade and prohibited as unlawful the taking of any condemnation proceedings, or without its consent, or any part of this defendant's right of way, or any interest or easement therein, by plaintiff herein or any other telegraph or telephone company, and repealed and rendered inoperative any act then existing, empowering or authorizing either a telegraph or telephone company to thus take or condemn longitudinally any part of a right of way of a railroad company or any interest or easement therein, including the Act entitled "An Act giving effect to so much of section one hundred and ninety-nine of the Constitution of the Commonwealth of Kentucky as provides for the right to construct and maintain lines of telegraph within this State," approved March 19, 1898, otherwise known as Section 4679c of Carroll's Kentucky Statutes (Edition of 1915), being the act under which this action or proceeding was instituted and has been prosecuted.

And thereby any power which plaintiff herein had theretofore had, if any at all existed, to condemn any part of defendant's right of way, or any interest or easement therein, in the State of Kentucky, was withdrawn by the State of Kentucky on and after June 12, 1916, and no longer exists.

210 This Court, therefore, has no longer any power or jurisdiction, if it ever had any, to grant plaintiff's prayer herein, or to enter any order or judgment condemning any part of defendant's right of way, or the use of any such part, or condemning any interest or easement therein, on the application of, or for the use or benefit of plaintiff herein, or to grant to plaintiff any relief whatever herein, or to proceed further herein, except to dismiss this action or proceeding for want of jurisdiction.

The defendant states that the taking of its property by the plaintiff, as it seeks to do herein, since the passage and effective date of said Act of March 14, 1916, would amount to the taking of defendant's property without due process of law in violation of the provisions of Section One of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, defendant prays that this action or proceeding be dismissed.

HELM BRUCE,
EDWARD S. JOUETT,
WILLIAM A. COLSTON,
HENRY L. STONE,

Attorneys for Defendant.

Milton H. Smith being duly sworn says he is President of the defendant Louisville & Nashville Railroad Company, and that the statements of the foregoing amended and supplemental answer are true.

MILTON H. SMITH.

Subscribed and sworn to before me by Milton M. Smith, this 10th day of February, 1919. My commission expires July 6, 1922.

C. W. SHAFT,

Notary Public, Jefferson County, Kentucky.

My commission expires July 6, 1922.

1 *Order Filing Reply to Amended Answer, Filed Feb. 15, 1919, and Demurrer to said Reply, Entered March 10, 1919.*

This day appeared the Plaintiff, Western Union Telegraph Company, and filed a Reply to the Amended Answer filed herein February 15th, 1919.

The defendant also appeared and filed a Demurrer to said Reply, and it is ordered that this cause be set for March 21st, 1919, for hearing.

2

Reply.

Filed March 10, 1919.

The plaintiff replies to the amended answer filed herein February 5, 1919, and now states:

As set forth in its original petition herein it was, at the time this suit was filed, in possession, with its poles and wires, of the right of way of the defendant in Kentucky as described in said original petition. It has continued ever since to be in such possession except so far as from time to time, as appears in the proceedings of this case, it has, under agreement with the defendant or otherwise, abandoned certain portions of said right of way.

Heretofore, to wit, on October 14, 1912, this plaintiff filed its bill in equity in this court against the defendant herein. In its said pleading it set out and it was true that it was in possession with its poles and wires of the right of way of the defendant as described in its petition herein. It was further alleged in said bill of complaint that the defendant was threatening to expel the plaintiff from said possession or to claim as forfeited to itself all the poles and wires of this plaintiff on said right of way if the same were not removed from said right of way on or before December 1, 1912. The said pleading further set forth the fact of the institution of this present action. The prayer of the said bill of complaint was to enjoin the defendant from putting into effect the above mentioned threats.

On December 28, 1912, the following proceedings were had in said cause:

13

No. 105.

"WESTERN UNION TELEGRAPH COMPANY

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

"This day came the parties by their respective counsel. This cause coming on to be heard upon the defendant's demurrer to the

complainant's Bill of Complaint, as amended, and having been argued by counsel, and the Court being sufficiently advised thereof it is considered, ordered and adjudged that said demurrer be, and it is hereby, overruled.

No. 105.

WESTERN UNION TELEGRAPH COMPANY

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

The Court being advised, upon the motion of the Complainant herein for a temporary injunction, delivered a written opinion which is now ordered to be filed and made a part of the record.

And thereupon it is ordered that the Louisville & Nashville Railroad Company, its officers, agents and servants, for six months from this date, or until the further order of the Court, with power in the Court from time to time to enlarge such designated period as may be equitable, are enjoined and restrained from taking possession of or interrupting the complainant in the use of any of its poles, wires or other apparatus situate upon the right of way of the defendant Louisville & Nashville Railroad Company, upon the following line of railroad of said defendant, namely, a line of railroad from Cincinnati, Ohio, through the State of Kentucky to Louisville, Kentucky, thence south through the State of Kentucky to Nashville, Tennessee, thence south to Decatur, Alabama, thence south to Montgomery, Alabama, thence south to Mobile, Alabama, thence south west to New Orleans, Louisiana; also a line of railroad beginning at Covington, Kentucky, and running thence south through the State of Kentucky and the State of Tennessee, to Knoxville, Tennessee, thence through Tennessee and Georgia to Marietta and

214 Junta, Georgia, and a belt road through the city of Atlanta, Georgia; also a line of railroad from St. Louis, Missouri, running thence southeast to Evansville, Indiana; thence south through Henderson, Kentucky, crossing the State of Kentucky, at Edgefield Junction, near Nashville, Tennessee, where it joins the first named line above described; also a line of railroad branching from the main line first above described at Bardstown Junction, Kentucky, and running to Springfield, Kentucky, another branch from Lebanon Junction, Kentucky, southeast through Kentucky to Livingston, where it joins the second named line above mentioned and turning off from the second main line at Corbin, thence south east and northeast to Norton, in the State of Virginia; also a line of railroad branching from the main line first above described, at Memphis Junction near Bowling Green, Kentucky, thence south west to Memphis, Tennessee; also a line of railroad from Owensboro, Kentucky, to Adairville, Kentucky; also a line of railroad from Columbia, Tennessee, to Sheffield, Alabama; also a line of railroad from Calera, Alabama, to Gadsden, Alabama, and from Gadsden, Alabama, to Birmingham, Alabama, and from Birmingham, Ala-

bama, to Tuscaloosa, Alabama; also a line of railroad from Georgiana, Alabama, to Graceville, Florida, and from Flomaton, Alabama, to Pensacola, Florida, and thence to River Junction in the State of Florida; and also all branches and spurs from any of these lines owned by the defendant, Louisville & Nashville Railroad Company, and upon which the poles and wires of the complainant are now situate, but not including any line of railroad in North Carolina.

It is ordered that this order is to be construed as requiring both parties to maintain the present status, but not to forbid the defendant from building any line which does not interrupt the service of complainant's line, nor the complainant from repairing and maintaining its line.

This order shall be of no further force or effect unless the complainant shall, within three days, execute a bond in the penalty of Seventy-five Thousand (\$75,000.00) Dollars, with surety to be approved by the Court, conditioned to pay to the defendant all damages which it may suffer by the suing out or continuing of this injunction.

"The defendant moved the Court to fix the penalty of this bond in the sum of Two Hundred and Fifty Thousand (\$250,000.00) Dollars, and the complainant moved the Court to fix the penalty of said bond in the sum of Fifty Thousand (\$50,000.00) Dollars, but the Court overruled both of said motions and fixed the penalty of the bond as above recited."

Said bond was duly executed.

The defendant herein subsequently moved to dissolve this injunction and the Court overrules said motion; the said defendant prayed and prosecuted an appeal to the Circuit Court of Appeals, where the said judgment of the lower court in refusing to dissolve the said injunction was affirmed. Said injunction has been continued from time to time and has been in full force and effect ever since it was first entered so far as the right of way of the defendant in Kentucky is concerned, and is still in full force and effect except that as above mentioned the plaintiff has, with the consent of the defendant, from time to time abandoned certain portions of said right of way. But such possession continues and has continued as to all of the right of way over which the plaintiff is now endeavoring to condemn an easement as prayed for in its original petition filed herein, as amended.

The plaintiff says that the Act referred to in said amended answer if applied to this litigation, would be unconstitutional and void under the Constitution of the State of Kentucky, because it would be an interference by the Legislative Department with proceedings pending in a judicial tribunal. Plaintiff, however, says that under a proper construction of the Statutes of the State of Kentucky said Act does not apply in the present proceedings herein nor in any way affect them. Plaintiff further says that to apply the said Act

to the present proceedings would be violative of the Constitution of the State of Kentucky and the Constitution of the United States, especially the Fourteenth Amendment of said

Constitution of the United States and the Fifth Amendment of the said Constitution of the United States.

Wherefore plaintiff prays as before and for all proper relief.

Attorneys for Plaintiff.

217

Demurrer.

Filed March 10, 1919.

Defendant, Louisville & Nashville Railroad Company, demurs to the reply of plaintiff filed herein on this date to the amended and supplemental answer of defendant filed herein on February 15, 1919, because said reply does not state facts sufficient to constitute an estoppel against or avoidance of the defense stated in defendant's said amended and supplemental answer, or to support a cause of action in favor of plaintiff.

HELM BRUCE,
ED S. JOUETT,
WILLIAM A. COLSTON,
HENRY L. STONE,
Attorneys.

218

Motion.

Filed April 11, 1919.

Defendant, Louisville & Nashville Railroad Company, moves the Court to dismiss this condemnation proceeding for the reasons set forth in its amended and supplemental answer filed herein, pleading the passage of the Act by the General Assembly of the Commonwealth of Kentucky, entitled, "An Act to protect Railroad Companies in the use and enjoyment of their rights of way by forbidding the condemnation thereof for other purposes," approved March 14, 1916.

HENRY L. STONE,
HELM BRUCE,
Attys. for Dft.

219

Order Filing Motion to Dismiss.

Entered April 11, 1919.

This day appeared the defendant and tendered a Motion to Dismiss this action, which is now ordered filed. The cause was argued by counsel for the respective parties on said motion to dismiss the action and on the Demurrer of the Defendant, filed March 10th, 1919, to the Reply, filed March 10th, 1919, to the Amended Answer, filed February 15th, 1919, and the Court, not being sufficiently advised thereof, takes further time to consider same.

220

Opinion.

Filed April 30, 1919.

The plaintiff, which we shall call the Telegraph Company, having for many years been in possession, under contract, of parts of the right of way of the Louisville & Nashville Railroad Company, which we shall call the Railroad Company, and having during all that time used the structures which, for telegraph purposes, the plaintiff had erected on that right of way, the first action above named was commenced on July 9th, 1912. It is a proceeding under Section 4679c (Vol. 2) of the Kentucky Statutes, which provided a way whereby the Telegraph Company, a public utility, could, as such, condemn to its use permanently certain parts of the right of way of the defendant, another public utility, and the part sought to be condemned is that which had so long been used by the Telegraph Company under the contract referred to. The conditions under which this is permitted to be done are prescribed in the statute. This proceeding will be called the Condemnation Case.

The Telegraph Company, on December 15th, 1915, moved the court as follows:

"The plaintiff, Western Union Telegraph Company, now moves the court as follows:

That the court do not order a jury to be summoned in this case until the court has, upon a day fixed therefor, heard such evidence as the parties may desire to introduce upon the following questions:

1. The necessity of the taking by the plaintiff of the easement sought by it herein to be appropriated to its use, as described in the petition;

2. Whether such appropriation, upon the location sought, and the erection, operation and maintenance in the usual manner of constructing, operating and maintaining telegraph lines, on or along or upon the right of way of the defendant, in the manner and upon the location prayed for in the petition, would interfere with the ordinary use by the defendant of its right of way, or with the ordinary travel and traffic on the railroad of the defendant;

That is, that the court do not order a jury to be summoned to determine what compensation is due to the defendant until it has been determined by the court that the conditions precedent to the right of the plaintiff to condemn have been established."

This motion was sustained, and after full hearing before the court it, on January 29th, 1916, made and entered its findings as follows:

"The court having heard and considered the testimony offered by the parties respectively upon the two questions tried by it without a jury and submitted to its judgment on the 24th inst., and having

also heard and considered the arguments for the respective parties, makes the following Findings of Fact; namely:

First. That there is a necessity for the taking by the plaintiff of the easement sought by it herein to be appropriated to plaintiff's use as described in its petition as amended; and,

Second. That such appropriation upon the location sought, and the erection, operation and maintenance in the usual manner of constructing, operating and maintaining telegraph lines on or along or upon the right of way of the defendant, in the manner and upon the location prayed for in the plaintiff's petition as amended, will not interfere with the ordinary use or the ordinary travel and traffic on defendant's railroad."

222 Early in February 1916, as will be seen, the Condemnation Case came on for trial before a jury sworn under subsection 4 of Section 4679e of the Kentucky Statutes to assess the damages and just compensation.

At the outset of that trial it became easy to recall that the case is an action at law. Not only is this true upon a proper construction of the statute of Kentucky but also upon the plain decision of the Supreme Court, which, in *Metropolitan, etc., Co. v. District of Columbia*, 195 U. S., at page 328, had said:

"That a proceeding involving the exercise of the power of eminent domain is essentially but the assertion of a right legal in its nature has been determined. So also the decisions of this court have settled that a condemnation proceeding initiated before a court, conducted under its supervision, with power to review and set aside the verdict of the Jury, and with the right of review vested in an appellate tribunal, is in its nature an action at law, *Kohl v. United States*, 91 U. S. 367, 376, *Searl v. School District No. 2*, 124 U. S. 197, *Chappell v. United States*, 160 U. S. 499, 513."

From this and from the fact that a claim to an interest in real estate was sought to be obtained, it then seemed inevitably to follow.

First. That Section 721 of the Revised Statutes of the United States (Sec. 1538 Comp. Stats., 1916) required that the law of Kentucky should be our guide. That Section reads as follows:

"The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials as common law, in the courts of the United States in cases where they apply."

This section has always been required to have dominating influence in trials where any interest in land is involved. In *Brine v. Insurance Co.*, 96 U. S. at page 635, the court said:

"The earliest utterance of the court on the subject is found in the case of the *United States v. Crosby* (7 Cranch 115), in which

223 this explicit language is used: 'The court entertain no doubt on the subject, and are clearly of opinion that the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situated.' And in *Clerk v. Graham* (6 Wheat. 577) it said: 'It is perfectly clear that no title to lands can be acquired or passed, unless according to the laws of the State in which they are situate.'

"In the case of *McCormick v. Sullevant* (10 id. 192), the court held a will devising lands in Ohio, which was made and recorded in Pennsylvania, where the deviser resided, and which was otherwise perfect, inoperative to confer title in Ohio, because it had not been probated in that State, as the law of Ohio required. 'It is an acknowledged principle of law,' said the court, 'that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another.'"

On page 636 the court further used this explicit language:

"We will close these citations by using the language which had the unanimous assent of the court in the recent case of *McGoan v. Scales* (9 Wall. 23): 'It is a principle too firmly established to admit of dispute at this day, that to the law of the State in which land is situated must we look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of conveyances.'"

Further along, on the same page in that case, the court used this language:

"This right, as a condition on which the title passes is as obligatory on the Federal courts as on the State courts, because in both cases it is made a rule of property by the legislature, which had the power to prescribe such a rule. See *United States v. Fox*, 94 U. S. 315."

That such statutes of a State become a rule of property in respect to real estate located therein has been held in so many cases as to be elementary.

Second. Furthermore, Section 914 of the Revised Statutes of the United States (Sec. 1537, Comp. Stats. 1916) is as follows:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the (circuit and) district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such (circuit or) district courts are held, any rule of court to the contrary notwithstanding."

224 In the somewhat recent case of *Knight v. Illinois Central R. R. Co.*, 180 Fed. 368, 374, the Circuit Court of Appeals of this Circuit held that the provisions of this section conferred upon litigants a "substantial right, and prescribes a practice and mode of

proceeding which, under the Federal statute, is binding upon the courts of the United States within that State."

These propositions, speaking generally, afforded the court at the trial what it supposed to be elementary guidance, and carefully examining Section 4679c of the Kentucky Statutes it endeavored to apply those rules throughout the trial. Kentucky, the only competent authority, had seen fit to enact that section with respect to public utilities doing their work and performing their functions in that State, and this court regarded that legislation as obligatory in this case. It was clear that the State might act upon the matter as it pleased and in its own discretion. *Slocombe v. Railway Co.*, 23 Wall. 108.

The third syllabus to the opinion in that case quite clearly and accurately shows one of the important points decided, namely:

"The mode of exercising the right of eminent domain, in the absence of any provision of organic law prescribing a contrary course, is within the discretion of the legislature. There is no limitation upon the power of the legislature in this respect if the purpose be a public one and just compensation be paid or tendered to the owner of the property taken."

Accordingly at the outset and upon what we thought was a most careful study of Section 4679c of the Kentucky Statutes (the only one relating to the subject) we found that it authorized a public utility corporation like the Telegraph Company to apply to the proper court for the condemnation to its use of certain parts 225 of the property of another public utility corporation, for example, a railroad company, under specified conditions, namely, that such condemnation should be necessary and should not interfere with the use of the property for railroad purposes.

We found that Clause 3 of the Section prescribed the mode of starting the necessary proceeding in such cases if, under Clause 2, the parties had not agreed upon the compensation to be paid. The parties here not agreeing upon the compensation the petition for condemnation, as the initial pleading, complied with all the requirements of that clause.

Under Clause 4 the clerk had issued the required summons and the Railroad Company had, by its pleading, made such defense to the petition as it thought proper to make. A panel of jurors had been summoned and were present. A jury of twelve men, as required by Clause 4, was then impaneled, and the oath administered to them was in the exact language prescribed by that clause, namely:

"I do solemnly swear as a member of this jury, I will a true verdict render in this cause, assessing for the defendant the actual cash value of so much of its land as may be shown by the proof will be actually taken and occupied by the petitioner, and such other incidental damages, if any, as shown by the proof will accrue to the remainder of the right of way for the purpose for which it is held by the defendant, by reason of the construction of petitioner's telegraph line in the manner set out in the petition, so help me God."

The formal stage being thus set, the trial before the jury began.

We found that the mode of procedure at the trial prescribed by the 5th Clause of Section 4679c was in this explicit language, namely:

"That the court shall admit any relevant testimony either party may offer to prove the cash market value of the land that will be taken and occupied by the petitioner, and all actual damages that will accrue to the defendant in the diminution of the value of the remainder of its right of way for railroad or turnpike purposes, as the case may be, by reason of the construction of the telegraph line upon such right of way in the manner set out in the petition, and
226 in considering incidental damages to the defendant, they may take into consideration any advantages that may accrue to the defendant as shown by the proof, by reason of the construction of such telegraph line."

We did not know of any reason why Section 721 of the Revised Statutes of the United States did not apply to this clause of Section 4679c of the Kentucky Statutes, and it may be admissible to say that many years ago there was impressed upon us the lesson that Section 721 of the Revised Statutes of the United States was specially applicable to questions respecting testimony, though we need not go further into it than to say that the proposition was summarized in the opinion of the Supreme Court in the case of *Nashua Savings Bank v. Anglo-American Co.*, 189 U. S., 228, where, in reference to Section 721, the court said:

"The 'laws of the several States' with respect to evidence within the meaning of this section apply not only to the statutes but to the decisions of their highest courts. *Bucher v. Cheshire Railroad Co.*, 125 U. S. 555, 582; *Ex parte Fiske*, 113 U. S. 713, 720; *Ryan v. Bindley*, 1 Wall. 66."

Indeed throughout this jury trial the court acted upon the view that Sections 721 and 914 of the Revised Statutes of the United States not only bestowed substantial rights upon the litigants but were binding upon the court. We endeavored to make those substantial rights available to either party by exact compliance with the provisions of each clause of Section 4679c. The limitations of Clause 5 thereof were not of the Court's making, and it did not then seem that the Court had a right to ignore them even though they might be objected to by the defendant, which most energetically insisted upon being allowed to depart from and even to go beyond those limitations. The Court could not then see how that could be done, as it appeared to be in disregard of the plain language of Clause 5 of the Statute.

227 In each instance where the Court confined the testimony to the limitations of that clause the Railroad Company declined to yield to the Court's view, and refused to introduce any testimony at all conforming to those limitations. At the opening of the trial the defendant had claimed the onus and the consequent right to open and conclude, and the Court had said in deciding upon the point that "I think it is perfectly obvious that in cases like this, where there has been the preliminary steps taken of an offer and a

refusal, the burden of proof is upon the defendant to show that more compensation ought to be allowed than was offered. I do not think there is any difficulty about it. The burden of proof at the former trial was put upon the defendant without any investigation or dispute about it, but as a matter of law I should certainly decide that defendant has the right to open and conclude." 2 Lewis on Eminent Domain, Sec. 645. It was the refusal of the defendant to introduce testimony conforming to clause 5 of Section 4679c which brought about the instructed verdict of \$5,000. The plaintiff had offered \$5 per mile before suit — brought, and we thought the burden of proving it to be worth more was not met.

The first but by no means the least important clause of Section 4679c is as follows:

"That a telegraph company chartered or incorporated by the laws of this or any other State, shall, upon making just compensation, as hereafter provided, have the right to construct, maintain and operate telegraph lines through any public lands of this State, and on, across and along all highways and turnpikes and across and under any navigable waters, and on, along and upon the right of way and structures of any railroad in this State: Provided, that the posts, arms, insulators, and other fixtures of such telegraph lines be erected and maintained in the usual manner of constructing, operating and maintaining telegraph lines on or along and upon the right of way of railroads, and on, across and along the highways, and across and under the navigable waters, and in such manner as not to interfere with the ordinary use of the ordinary travel and traffic
228 on such highways, railroads or waters, or that of any other telegraph line already constructed on the right of way of any railroad."

While this clause fixed the condition upon which the condemnation provided for in the section might be obtained, it did not specify by whom the questions thus necessarily presented should be heard nor whether they should be decided before or after the jury had acted in assessing the compensation and damages. However, the Court of Appeals of Kentucky had before it on two occasions the case of Warden v. Madisonville, etc., R. R. Co. The report of the first appearance of that case in the Court of Appeals is found in 125 Ky, beginning with page 644. There the railroad company had filed a petition for the condemnation of certain rights of way desired by it. This proceeding was under the Kentucky Statutes which authorized such condemnation as was then sought, and the court said that it was not necessary for the plaintiff to allege anything in its petition other than that the land proposed to be taken was necessary. The court said, "the defendant may take issue upon this question if he desires to do so, but the question is one of law for the court, and must be determined by the court."

The jury found a verdict for the amount to be paid the owner, but errors having been committed by the court on the trial of the questions of law, the judgment for that reason was reversed and the case was sent back to the lower court with directions repeated as follows

in the second report of the case found in 128 Ky. 565, where the court said:

"The opinion of the first appeal will be found in 125 Ky. 644, 101 S. W. 914, 31 Ky. L. R. 234. In that opinion this court said: 'On the return of the case to the circuit court, the court will set aside the order sustaining the demurrer to so much of the answer as denied the incorporation of the plaintiff, and will hear proof as to the incorporation and as to the necessity of the strip of land proposed to be taken. A copy of the articles of incorporation duly certified will make out a prima facie case for the plaintiff as to its incorporation. If the proof shall satisfy the court that the strip of land is necessary for the purposes of the railroad company and that the railroad company has been properly incorporated, he will then enter a judgment upon the verdict of the jury. The verdict of the jury will stand, as there was no error in the proceedings before the jury, and the questions to be determined are purely questions of law for the court, but which must be determined by the court before a judgment taking the defendant's property for the plaintiff's use can properly be entered.'"

The court also said on page 567 that:

"In the construction of statutes relating to the taking of private property the word 'necessity' should be construed to mean 'expedient,' 'reasonably convenient or useful to the public, and can not be limited to the absolute physical necessity. This, we think, was certainly the intention of the legislature when the act was passed. The view here expressed seems to be well supported by authorities."

We thought there could be no error under the Kentucky practice established in the Warden case in holding that the Court and not the jury should determine the questions of law arising under Clause 1 of Section 4679c. Support was given to this by Clause 4 which covers the oath to be taken by the jury, and it was thought that this necessarily limited the functions of the jury to the mere questions of compensation. So that it seemed clear from the opinion in that case that the practice and mode of procedure in Kentucky in respect to suits for the condemnation of land was that the court should adjudicate the questions of law covering the conditions under which condemnations could be made under Clause 1 of that section. It would seem to be clear from the Warden case that it was entirely proper for that finding by the court to be made after the verdict, and we found nothing in the section which forbade its being done before the jury acts, in which event if the court finds that none of the conditions existed upon which the condemnation may be made, there would be no necessity for the empaneling of the jury. The argument of convenience at least would support this course.

At all events, the court concluded that it was within its discretion to investigate and determine the questions of law arising under Clause 1 in advance of the coming of the jury. It did not occur to the court at that time that it was possibly more just that the testimony on the question of compensation should not be confused

and commingled with that of the necessity for condemnation, nor did it then occur to the court that great harm might be done to the one side or the other by the hearing of promiscuous testimony upon other subjects than those bearing directly upon the duty of the jury as disclosed by the statutory oath it was to take, and the court, in the exercise of any discretion it had, and in view of the fact that it was the practice approved in the Warden case and was not forbidden by the statute, ruled as it did on the motion to dispose of the questions of law first.

But these matters apart, the burden being on the defendant, the jury, after a long hearing, on February 16th, 1916, under the Court's instruction, returned its verdict, and thereupon a judgment was entered as follows:

"In this case the claim of the Western Union Telegraph Company to have condemned to its use the right to construct, maintain and operate its lines of telegraph upon the right of way of the defendant, the Louisville & Nashville Railroad Company, in this State in the manner hereinafter described was submitted on February 16, 1916, to the jury heretofore impaneled and sworn herein, and said jury on the same day, under the Court's instruction, returned a verdict as follows:

"We, the jury, assess the damages and just compensation to be paid the Louisville and Nashville Railroad Company by the Western Union Telegraph Company to be five thousand dollars.

G. L. HAYDON,

One of the Jury."

The right of way of the Louisville & Nashville Railroad Company above referred to is as follows:

Main Stem, Louisville to Tennessee State Line	139.33 Miles
231 For a part of this distance there is at present a line of telegraph on both sides of the right of way, but where this is the case this judgment is to apply only to the west side of the right of way.	
Lebanon Branch, Lebanon Junction to Sinks.....	107.1
Cincinnati Division, Louisville to Newport.....	106.76
Lexington Branch, La Grange to Lexington.....	65.7
Shelby Branch and Shelby Cut-Off—Anchorage to Christiansburg	27.
Kentucky Division, Covington to Corbin.....	184.1
Paris & Lexington Branch, Paris to Lexington.....	17.6
Knoxville Division, Corbin to Tennessee State Line and Saxon to Jellico.....	32.9
Cumberland Valley Division, Corbin to Virginia State Line	46.7
Memphis Line, Memphis Junction to Guthrie.....	46.5
Owensboro & Nashville Division, Russellville to Owensboro	71.4
Henderson Division, Guthrie to Henderson.....	97.74
Total mileage	942.83

It is adjudged that the petitioner is to have right perpetually to construct, maintain and operate its lines of telegraph consisting of poles, wires and fixtures over, upon and along said right of way above described, and to occupy said right of way, including bridges (subject to the exceptions hereinafter stated), tunnels, trestles and viaducts of the defendant, Railroad Company, now occupied by the petitioner with its poles, wires and appurtenances, and to maintain and operate its said line of telegraph where now placed and located, or hereafter constructed, subject to such changes of location in said right of way as the necessities of the Railroad Company may require, together with a right and easement on the part of the Western Union Telegraph Company to enter on and over said right of way and above described structures of said Railroad Company for the purpose of maintaining, rebuilding or reconstructing the said telegraph line along the same.

It is, however, provided that the following bridges over which the plaintiff has now no telegraph lines are excluded herefrom, viz.:

- (1) Bridge over the Kentucky river at Fords.
- (2) Bridge over the Kentucky river at Frankfort.
- (3) Bridge over the Cumberland river at Pineville.
- (4) Bridge over the Cumberland river at Williamsburg.
- (5) Bridge over the Barren river at Bowling Green.
- (6) Bridge over the Licking river at Newport.

It is further provided that this judgment shall not apply to the following bridges over which the plaintiff now has its lines, to wit:

- (7) Bridge over the Kentucky river at Worthville.
- (8) Bridge over Green river at Munfordville.
- (9) Bridge over Green river at Livermore.
- (10) Bridge over the Ohio river between Newport and Cincinnati.
- (11) Bridge over the Ohio river between Henderson and the Indiana State Line.

232 It is further adjudged as follows:

That in any removal or reconsideration of said telegraph line no more land along the right of way of the defendant Railroad Company shall be used than that now occupied by the petitioner.

That the Railroad Company shall have the right to take from that part of the right of way over which the wires of the petitioner may be strung, all the dirt, gravel, sand, stone, water and other materials of every kind and character that the Railroad Company may need from time to time—and in the event said right of way is cut down or the grade thereof changed in any manner, the petitioner is to reset its poles and wires at its own expense, upon due and reasonable notice in writing to that effect, so as to make them conform to

such new grade and said poles shall not be so set as to interfere with any ditch, drain or culvert or other work or structures of defendant.

That in the event the defendant Railroad Company shall at any time desire to change the location of its tracks, or to construct new tracks, or to construct new depots or other buildings, or to change the location of same where any of the petitioner's poles or wires are located upon its right of way, the petitioner shall remove its poles and wires at said points to any other part of the defendant's right of way adjacent thereto designated by the defendant, upon giving and reasonable notice in writing to that effect, and at the expense of the petitioner.

That the petitioner shall assume all the risks of its poles, wires, insulators and cross-arms, and shall hold the defendant, the Louisville & Nashville Railroad Company, harmless from any damage to any of the petitioner's property occasioned by the burning of grass or undergrowth upon said railroad right of way; and said petitioner shall have no right to fence any of said right of way nor in any manner to exclude the defendant therefrom.

That upon the payment of the above award, either to the defendant, Louisville & Nashville Railroad Company, or to the Clerk of this Court, and all costs in this behalf expended by the defendant and the petitioner, the Western Union Telegraph Company, may continue in the occupancy of said property of the defendant Railroad Company, and continue to appropriate so much thereof as is above described.

Unless the petitioner shall pay the amount of said award and costs as aforesaid on or before the 1st day of June, 1916, the petitioner shall be deemed and considered to have abandoned this proceeding to condemn the property and rights above described, over, on and along the said railroad rights of way of the defendant for the construction, operation and maintenance of a telegraph line thereon, and all rights thereto acquired under this judgment shall be deemed and considered to have been forfeited by the petitioner and the defendant shall be entitled to recover of the petitioner, and is hereby adjudged its costs herein expended, for which execution may issue.

That in the event the Western Union Telegraph Company shall not pay the amount of said award to the Clerk of this Court, then the Clerk of this Court shall mail written notice of these proceedings

of the award to the Trustees hereinafter named in the mortgage

233gages set out in the answer of the defendant herein, to wit: Central Trust Company of New York, Trustee under mortgage dated June 1, 1880.

Central Trust Company of New York, Trustee under mortgage dated June 2, 1890.

United States Trust Company, Trustee under mortgage dated April 30, 1887.

Mercantile Trust Company of New York, Trustee under mortgage dated November 1, 1881, executed by Louisville, Cincinnati & Lexington Railway Company.

United States Trust Company of New York, Trustee under mortgage dated April 1, 1905.

Central Trust Company of New York, Trustee under mortgage dated December 6, 1879, executed by Evansville, Henderson & Nashville Railroad Company.

Metropolitan Trust Company of New York, Trustee under mortgage dated July 1st, 1887, executed by Kentucky Central Railway Company.

Central Trust Company, Trustee under mortgage executed by Owensboro & Nashville Railroad Company, dated November 1st, 1881.

The payment of the amount of said award shall not be made by the petitioner to the Clerk of this court if the defendant shall obtain and file with him on or before the 15th day of May, 1916, written release or waivers by the Trustees aforesaid of their right or claim to have the amount of said award, or any part thereof, paid to the Clerk of this court, and consenting that the same may be paid to the defendant.

To all the foregoing judgment the defendant, Louisville & Nashville Railroad Company, excepts.

That execution of this judgment is suspended until April 5, 1916, in order to give each party time in which to file a petition for a new trial; and time is given to each of the parties until June 1, 1916, to tender a Bill of Exceptions herein."

On March 8th, 1916, an order was made in these terms, to wit:

"This day came the Western Union Telegraph Company and paid into the registry of the court in this cause the sum of Sixty-eight hundred and twenty-five dollars and twenty-six cents (\$6,825.26), the amount of the judgment entered herein February 16, 1916, and costs."

Thus a "final judgment," as that phrase is used in respect to appellate proceedings, was rendered in the Condemnation Case, and thus the requirements of that judgment were performed by the Telegraph Company—that is to say, a final judgment had been rendered and fully complied with by the Telegraph Company, and the title to the property had thereby, *prima facie*, passed. This was the situation on March 8th, 1916.

234 Meantime, on the 19th day of October, 1912, the second of the above styled actions, namely, the Injunction Suit, had been brought by the Telegraph Company, which alleged that, pending the Condemnation Suit, the Railroad Company was threatening to interfere with its possession and operation of its telegraph lines, and thereupon prayed for an injunction *pendente lite* against the Railroad Company restraining it from such interference. An injunction appropriate to this situation was entered on February 7th, 1913.

The temporary injunction thus granted applied to the action of the Railroad Company in respect to the property of the Telegraph Company in any State of the Union through which its lines then ran upon the right of way of the Railroad Company. Shortly afterwards the Railroad Company moved to dissolve the temporary injunction and the matter received great attention. In an opinion delivered

December 28th, 1912 (201 Fed. 946), this court gave its reasons for its action respecting the temporary injunction, at page 950, making a statement which will sufficiently explain for present purposes, the grounds upon which the injunction was made operative outside of Kentucky. It was there said that, "The matter before us, however, appears to have a much broader significance when we consider that we are asked to protect a unified property and plant extending through several States, including Kentucky, from dismemberment into fragments in any of them while the condemnation suit is being fought out here."

Upon an appeal to the Circuit Court of Appeals the action of this court in granting a temporary injunction was adjudged to have been proper (207 Fed. 1). Although it was never imagined that
235 the Condemnation Suit would result in as protracted a litigation as has ensued, the temporary injunction thus granted and upheld has been in force ever since, except so far as it has, for special reasons, been modified in respect to certain parts of the lines in the States of Indiana and Alabama, and possibly one other State.

In March 1916 the Legislature of Kentucky passed an Act entitled "An Act to protect railroad companies in the use and enjoyment of their rights of way by forbidding the condemnation thereof for other purposes." This Act was approved by the Governor of the State on March 14th, 1916 (Acts 1916, page 69), and is as follows:

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Sec. 1. That no part of the right of way of any railroad company or any interest or easement therein, shall be taken by any condemnation proceedings, or without the consent of such railroad company, for the use or occupancy of any part of such right of way, on, over, and along such right of way longitudinally, by any telegraph, telephone, electric light, power, or other wire company, with its poles, cables, wires, conduits, or other fixtures; provided, that nothing in this section shall be construed as preventing any such wire company from obtaining the right to cross the right of way of a railroad company, under existing laws in such manner as not to interfere with the ordinary use or ordinary travel and traffic of such railroad company's railroad.

Sec. 2. That all acts and parts of acts in conflict with this act be and the same are hereby repealed."

Section 55 of the Constitution of Kentucky reads thus:

"No act, except general appropriation bills, shall become a law until ninety days after the adjournment of the session at which it was passed, except in cases of emergency, when, by the concurrence of a majority of the members elected to each House of the General Assembly, by a yea and nay vote, entered upon their journals, an act may become a law when approved by the Governor; but the reasons for the emergency that justifies this action must be set out at length in the journal of each House."

The Act on its face shows an absence of any emergency deemed by the legislature sufficient to take the Act out of the ninety-day rule fixed in Section 55 of the Constitution.

36 The adjournment of the session of the legislature during which the Act referred to was passed took place ninety days before June 12th, 1916, on which date the Act became effective as a law of the State.

On the 29th day of June, 1916, a petition for a writ of error was filed in this court in the Condemnation Case. This petition, which might be said to supply the conduit through which this suit could formally pass to the Circuit Court of Appeals, was granted as of course, no objection being made, and the case went to the Circuit Court of Appeals. That court, in April 1918, pursuant to an opinion then delivered (249 Fed. 385) reversed the judgment entered by this court on February 16th, 1916, and ordered that a new trial of the action be awarded the Railroad Company, and that that trial should be conducted pursuant to the opinion of the Circuit Court of Appeals. That new trial is to be had in due course at the next term of the court.

On the 15th day of February, 1919, the Railroad Company filed an amended answer in the Condemnation Suit, in which is set out no fact except that the Legislature of Kentucky had passed the Act approved March 14th, 1916, above set forth. The Act itself was set out in *laec verba* in the pleading, and it was urged—probably argumentatively—in the amended pleading that the right of the Telegraph Company to maintain that action had been taken away by the new law. The plaintiff filed a reply to this amended answer, but therein—probably redundantly—averred, what the record already fully showed, namely, first, that at the time its petition was filed it was in possession of all parts of the right of way sought to be condemned; second, that in aid of its Condemnation Suit it had, 237 in October 1912, filed its bill in this court to enjoin the Railroad Company from its threatened interference with plaintiff's possession of the property sought to be condemned during the pendency of the Condemnation Suit; third, that the injunction thus sought had been granted and the decree to that effect is copied in the reply; and, fourth, plaintiff stated—probably argumentatively—the grounds upon which it insisted that the Act approved March 14th, 1916, did not affect this litigation. To this reply the Railroad Company filed a demurrer. It has also filed a motion to dismiss the Condemnation Suit upon the ground that the Act of March 14th, 1916, withdrew the right to prosecute it.

On March 10th, 1919, the Railroad Company filed an almost precisely similar amended and supplemental answer in the Injunction Suit. It therein set forth in full the Act of March 14th, 1916, and insisted in the pleading that the injunction ought to be dissolved upon grounds essentially similar to those urged in the similar pleading in the Condemnation Suit for the dismissal thereof, and especially that there was now no law of Kentucky permitting or authorizing the condemnation sought. The filing of this pleading was followed by a motion to dissolve the injunction. By its motion filed

March 11th, 1919, the Telegraph Company moved to strike out practically all of the important allegations made in the amended and supplemental answer filed in the Injunction Suit.

In this way were raised the questions argued most elaborately at the hearing. Those questions are, in all essential respects, the same in both cases, and may be disposed of in one opinion.

Passing for the present any discussion of certain technical
238 difficulties in the way of each of the parties, the court comes at once to the consideration of the questions argued or which necessarily present themselves to the court when again endeavoring correctly to dispose of two closely related cases with which, at one time, it supposed itself to be familiar for the reason that it had bestowed upon them more industrious and painstaking labor than it had ever been able to give to any other case ever presented to it.

At the outset of the argument of counsel for the Telegraph Company the question was raised and discussed as to the effect of the Act of March 14th, 1916, when viewed in connection with Section 465 of the Kentucky Statutes.

It may aid in the discussion and settlement of the very important questions thus raised, again to recall that the judgment of condemnation was entered in this court on February 16th, 1916; that the damages therein assessed were paid into court on March 8th, 1916; that in this way the title sought to be obtained through the condemnation suit had judicially passed to the Telegraph Company, subject, of course, under the then existing law, to the right of appellate proceedings; that the new legislation was approved on March 14th, 1916; that it went into effect on June 12th, 1916, and that the petition for the writ of error was not filed nor allowed until June 29, 1916—an interim of possible importance. As we said to counsel at the argument, we had imagined it not impossible that there might be opposition to the granting of the writ of error after June 12th, 1916, as the new Act had then become effective, and that in view of such possibility it had occurred to us to look somewhat into the authorities bearing on the situation. A number of decisions by the

Supreme Court were examined like *New Orleans, &c. Co. v.*
239 *Glover*, 160 U. S. 170, where "pending appeal" the statute on which the case rested had been repealed without a saving clause. In all these it was held that the judgment should be reversed and the costs apportioned. An even later example of this has now developed in the case of *The Board of Public Utility Commissioners v. Compania General, &c.*, decided April 14, 1919. We did not, however, conclude that these decisions conflicted with those in the cases now to be mentioned. We also told counsel that we soon found many authorities which seemed to indicate that the applicable doctrine of the Supreme Court probably might be that "if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all such suits must stop where the repeal finds them. If the final relief has not been granted before the repeal went into effect it can not be after. *Railroad Co. v. Grant*, 98 U. S. 398, and cases cited." Other cases which possibly support

the proposition thus stated are *McNulty v. Battv*, 10 Howard 76, 79, and *Gorman v. Grinnell*, 123 U. S. 679.

This would possibly appear to mean that, unless there be a saving clause, this litigation must stop at the status thereof existing and fixed on June 12th, 1916, namely, with the final judgment of condemnation in full force and fully performed by the Telegraph Company by the payment into court on March 8th, 1916, of the compensation fixed, some days before the new statute had been approved and a still longer time before it took effect on June 12th, 1916, which event came seventeen days before the writ of error was applied for.

In this situation opposition to filing or granting the writ of error might possibly have been made or else the Circuit Court of Appeals might have been urged to dismiss the writ or affirm the judgment upon the grounds indicated. Other cases might be referred to were it not now a moot question so far as the form or effect of appellate proceedings may be concerned, and we refer to it only as illustrating the proposition now under consideration and in view of the conclusions presently to be stated.

However, we also had noticed, as we stated to counsel, that in this State Section 465 of the Kentucky Statutes or the jurisprudence of the State might supply the necessary saving clause. Recalling these previous studies we, during the late hearing, ventured to ask counsel for the Railroad Company what position they would probably have taken had the counsel for the Telegraph Company, after June 12, 1916, pursued the course which we had imagined to be possible. This question received no response nor was any in the slightest degree obligatory upon counsel, but it was by no means an idle question, for we could not suppose that they would, in the imagined controversy, if coming on before the reversal referred to, have taken the position they now in effect take, namely, that the proper construction of the Act of March 14, 1916, requires a dismissal of all this litigation and a dissolution of the injunction because Section 465 does not supply an adequate saving clause. If that section could supply that saving clause then, why will it not do so now? We can, indeed, imagine counsel taking the position in an argument on a movement questioning the right of the Railroad Company to a writ of error in June 1916 or to an affirmance in 1918 that would be precisely the opposite of contentions they might make now. But be that as it may, one obvious advantage to all parties, had the question then been raised, would be that those now presented would have been then settled. Instead, at least some of those questions are very much live, and we have industriously sought the proper solution of them.

Stated generally the questions now to be determined are:

First. Was the Act of March 14th, 1916, intended to be prospective only in operation, or was it also intended that it should be retroactive to the extent that it should now control litigation then pending?

Second. Is that Act to be construed in connection with Section 465 of the Kentucky Statutes, or independently thereof? and

Third. Is Section 465 sufficiently clear in its language to embrace any legislation not relative to criminal acts and penalties?

Section 465 reappeared in the legislation of Kentucky as part of the Kentucky Statutes adopted by the Act of July 3, 1893. Before that date, however, Kentucky had a jurisprudence, per se, furnishing what was supposed to be equivalent to an adequate saving clause. That jurisprudence, whatever it was, must be presumed to have been well known to, and to have been in the contemplation of, the legislative body of the State alike in 1893 and 1916.

Section 465 is as follows:

"No new law shall be construed to repeal a former law as to any offense committed against the former law, nor as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture, or punishment so incurred, or any right accrued or claim arising before the new law takes effect, save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. If any penalty, forfeiture, or punishment be mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect."

242 The essential principle of the jurisprudence of Kentucky to which reference has been made, as counsel of the Telegraph Company contends, was established by decisions of the Court of Appeals of the State in cases like *Thweatt v. Bank of Hopkinsville*, 81 Ky. 1, *Hedger v. Rennaker*, 3 Metcalfe 255, and *Gaines v. Gaines*, 9th Ben Monroe, 300. Probably viewed from the Telegraph Company's standpoint that jurisprudence finds adequate expression in what was said by that court in the case first mentioned of *Thweatt v. Bank of Hopkinsville*, as follows:

"But it has been held by this court that the legislature has no power, when a controversy is pending before a judicial tribunal between persons concerning their legal rights already defined and fixed by existing laws, to interfere, and by retroactive legislation for the benefit of one of the litigants, put an end to the contest and destroy or impair the rights of the other.

The judicial being a co-ordinate and independent department of the state government, can not consent that either one of the other departments shall interfere with it in the exercise of its exclusive right to determine the law of existing cases. (*Gaines v. Gaines*, 9 B. M., 295; *Allison, &c., v. Louisville, Harrod's Creek and Westport Railway Co.*, 9 Bush 248.)

It is true appellant has neither the legal nor equitable title to the land. But he did, when the action was commenced, as is evident from the allegations of the petition filed by appellee, have posses-

sion, claiming it as his own; and as the record stood previous to the passage of the statute, he could have successfully resisted the recovery by appellee of either the land or rents therefrom. The effect of the statute, if it be treated as valid, is to cause a different decision of the action from the one the court before which it was pending would have been required, by laws existing when it was commenced, to render.

And to the extent that the statute affects this action, pending at the time it was enacted, it is invalid, because it is an exercise by the legislature of judicial power, and an invasion by one department of the state government of the province of another distinct and independent department."

The Telegraph Company also urges that strong support of its view is to be found in the opinion of the Supreme Court in *Great Northern R. R. Co. v. United States*, 208 U. S. 452. The first syllabus to that opinion, which will be inserted later, will probably sufficiently indicate the doctrine now relied upon.

We do not think it necessary to go into more detail upon the Telegraph Company's argument on this phase of the discussion.

The Railroad Company contends that the Act of March 14th, 1916, was designed to be an absolute and unconditional withdrawal of the privilege given to telegraph companies by Section 4679c of the Kentucky Statutes, and that as the Act makes no provision for pending suits and contains no reference to them, this case must now come to an end. In effect this argument is that the time when the case should be regarded as having come to an end was when the judgment of this court was reversed in 1918, while other authorities appear to indicate that if the Act of March 14, 1916, brought this litigation to an end at all, that result was reached on June 12, 1916, when that Act became effective, and before the writ of error was sued out on June 29, 1916. Furthermore, the Railroad Company contends that as Section 465 of the Kentucky Statutes makes no reference to pending proceedings, it can not be held to exempt them from the general result intended by the new legislation.

Many authorities are cited in this connection, but special stress seems to be laid upon the case of *Railroad Co. v. Grant*, 98 U. S. 398, and what is copied from it may for present purposes adequately present the scope of these contentions. In its opinion in that case the Supreme Court said:

"It is claimed, however, that, taking the whole of the Act of 1879 together, the intention of Congress not to interfere with our jurisdiction in pending cases is manifest. There is certainly nothing in the Act which in express terms indicates any such intention. Usually where a limited repeal only is intended, it is so expressly declared. Thus, in the Act of 1875 (18 Stats. 316), raising the jurisdictional amount in cases brought here for review from the

244 Circuit Courts, it was expressly provided that it should apply only to judgments thereafter rendered; and in the Act of 1874 (id. 27), regulating appeals to this court from the Su-

preme Courts of the Territories, the phrase is, 'that this Act shall not apply to cases now pending in the Supreme Court of the United States where the record has already been filed.' Indeed, so common is it, when a limited repeal only is intended, to insert some clause to that express effect in the repealing Act, that if nothing of the kind is found, the presumption is always strong against continuing the old law in force for any purpose. We think it will not be claimed that an appeal may now be taken or a writ of error sued out upon a decree or a judgment rendered before the Act of 1879 took effect, if the matter in dispute is not more than \$2,500; but it seems to us there is just as much authority for bringing up new cases under the old law as for hearing old ones. There is nothing in the statute which indicates any intention to make a difference between suits begun and those not begun. If, as is contended, the object of Congress was to raise our jurisdictional amount because of the increase of the judicial force in the District, we see no good reason *why* those who had commenced their proceedings for review of old judgments should be entitled to more consideration than those who had not. No declaration of any such object on the part of Congress is found in the law; and when, if it had been the intention to confine the operation of what was done to judgments thereafter rendered or to cases not pending, it would have been so easy to have said so, we must presume that Congress meant the language employed should have its usual and ordinary signification, and that the old law should be unconditionally repealed."

What was said by the Kentucky Court of Appeals in *Pannell v. Louisville Tobacco Warehouse Co.*, 113 Ky. 630, is also much relied upon by counsel for the Railroad Company. Of the Act under discussion in that case the Court of Appeals said:

"By the Act in question the Legislature undertook to take out of the operation of Section 465 the repeal of the act in controversy, and we are unable to see that this is a violation of the constitutional provision."

It may be, however, that the Act considered in that case can hardly be regarded as parallel to that under discussion here, inasmuch as it related altogether to penalties.

After considering these various contentions and authorities it seems to the court that the proper conclusion therefrom would be that before 1893, when Section 465 was enacted, the well settled rule in Kentucky was that announced in the case of *Thweatt v. Bank of Hopkinsville*. This is what we have spoken of as the jurisprudence of Kentucky existing when Section 465 was enacted, and it may be assumed that the legislature of that day had it in contemplation when Section 465 was enacted, and that that section should be construed in harmony with that pre-existing jurisprudence and not as destructive of it.

We have been at pains to go quite fully into the history of this litigation in both of its forms because it was conceived that doing

so would give a much clearer understanding of the question now before us which, generally speaking, is whether the litigation shall now be brought to a close under the operation of the Act of March 14th, 1916, or whether it shall continue to final judgment;

First. Under the operation of the jurisprudence and the established rule of public policy of Kentucky as evidenced by the judicial opinions of its highest court, or

Second. Under the operation of Section 465 of the Kentucky Statutes, or

Third. Under the operation of general rules of statutory construction, or

Fourth. Whether it shall proceed to final judgment under the mandate and opinion of the Circuit Court of Appeals lately filed herein directing a new trial of the Condemnation Suit, to which the Injunction Suit may be regarded as an annex, which must stand or fall with the first suit, or

Fifth. Whether there shall be a dismissal of both suits upon the ground that at the present stage of the litigation there is no law to support the claims of the Telegraph Company?

246 As to the Kentucky Jurisprudence, we think nothing need be added to what we have said on that phase of the subject, except to refer to the established rule that the Federal Courts are bound by and must follow the rules for the construction of State statutes established by the decision of the highest court of the State, whose statutes are under consideration, unless some question arises under the Constitution of the United States. The opinion of the Court of Appeals of Kentucky in *Thweatt v. Bank of Hopkinsville*, 81 Ky. 1, seems to be adequate to the support of the view that in that State the legislature can not constitutionally give to a statute a retrospective operation in such way as to affect a pending suit.

As to Section 465 of the Kentucky Statutes, this section, enacted, as we have seen, in 1893, must be presumed to have been based upon the knowledge of the legislature as to the then established rule in respect to the proper construction of repealing statutes in that State.

We have already set out that section in full. Leaving out all parts of it which refer to criminal or penal suits or prosecutions, it reads as follows:

"No new law shall be construed to repeal a former law as to * * * any right accrued or claim arising under the former law or in any way whatever to affect * * * any right accrued or claim arising before the new law takes effect, save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings."

The contention of the Railroad Company is that the Act of March 14th, 1916, withdrew the privilege granted to the telegraph

companies by Section 4679c of the Kentucky Statutes without any provision excepting from that general and sweeping rule, suits then pending, and we have cited some of the authorities which, the defendant argues, support the contention. Upon the terms of 247 the Act of March 14, 1916, if there were no Kentucky jurisprudence on the subject, and if Section 465 did not exist, there might be great force in the contention, but there is that jurisprudence and there is Section 465, both of which yet appear to be in full force, and it seems to the court that their combined influence is irresistible. If that jurisprudence did not exist Section 465 of itself seems clearly to save the right to condemn the property involved in this litigation the claim to do which, under Section 4679c, the Telegraph Company had asserted in the Condemnation Suit in 1912, long before the Act of March 14th, 1916, took effect in June of that year. Certainly this litigation unmistakably shows a "claim arising under the former law" to have been in process of judicial settlement when the Act was repealed, and if that right existed then, it must either have ceased to exist on June 12th, 1916, or else it continues until now, as there would seem to be no logical reason why it should have an existence in 1916 when the Act took effect, and in 1918 when the Circuit Court of Appeals acted upon that case, and yet have none at the present time.

As to the General Rules of Statutory Construction.

Upon these rules the decisions have been very numerous.

In the *Twenty Per Cent. Cases*, 20 Wall., at page 187, the Supreme Court said:

"Courts of justice agree that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of actions, or with vested rights, unless the intention that it shall so operate is expressly declared or is to be necessarily implied, and pursuant to that rule courts will apply new statutes only to future cases, unless there is something in the nature of the case or in the language of the new provision which shows that they were intended to have a retroactive operation. Even though the words of a statute are broad enough in their literal extent 248 to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms."

Among the cases cited by the court upon this general proposition were *McEwen v. Bulkley*, 24 How. 242, *Harvey v. Tyler*, 2 Wall. 329, and *United States v. Heth*, 3 Cranch 339.

The case of the *Southwestern Coal Co. v. McBride*, 185 U. S. 499, 503, arose in the Indian Territory. The Circuit Court of Appeals had passed upon it in such a way as fully to meet the views of the Supreme Court, which, in its opinion, said:

"We adopt the reasoning of the court below on the subject. The court said (104 Fed. Rep. 473):

The function of the legislature is to prescribe rules to operate upon the actions and rights of citizens in the future. While, in the absence of a constitutional inhibition, the legislature may give to some of its acts a retrospective operation, the intention to do so must be clearly expressed, or necessarily implied from what is expressed; and, assuming the legislature to possess the power, its act will not be construed to impair or destroy a vested right under a valid contract unless it is so framed as to preclude any other interpretation. If Congress has intended to deprive lessors of the royalties due and owing to them at the date of the act it would have used appropriate language to express that intention, and would necessarily have made some provisions for the disposition of such royalties.

In Volume 11 of the Encyclopedia of United States Supreme Court Reports, pages 126, 127, are collected a great number of other cases holding the same view.

And a general rule is stated in the first syllabus to the opinion of the Supreme Court, above referred to, in *Great Northern R. R. Co.*, 208 U. S. 452, as follows:

"The provisions of Sec. 13, Rev. Stat., that the repeal of any statute shall not have the effect to release or extinguish any penalty incurred under the statute repealed, are to be treated as if incorporated in, and as a part of, subsequent enactments of Congress, and, under the general principle of construction requiring effect to be given to all parts of a law, that section must be enforced as forming part of such subsequent enactments except in those instances where, either by express declaration or necessary implication, such enforcement would nullify the legislative intent."

In other words, Section 465 should be read into the Act of 249 March 14, 1916.

An interesting opinion is that of Judge Brown of the Eastern District of Michigan (afterwards Mr. Justice Brown, of the Supreme Court) in the case of *Osborne v. City of Detroit*, 32 Fed. 36, 41, on the latter of which the court said:

"In 1885 an act was passed to amend the act of 1879, in which the word 'sidewalk' was inserted with the words 'highway, street, bridge, cross-walk, and culvert,' and new sections were introduced, limiting the amount of recovery upon the basis of population, and providing that 'the common-law liability of townships, villages, and cities in this state for such injuries is hereby abrogated.' This act was approved June 17, 1885, but did not take effect until August 17th.

"The accident in this case took place November, 1883; suit was begun September, 1884; and in June, 1885, the case was first tried upon plea to the jurisdiction. We think it clear that the acts should be construed as prospective only in its operation. There were doubtless many other cases pending in the federal courts and in the courts of the state at the time this act took effect, and, if it were intended that the act should apply to these cases, no doubt the legislature

would have so declared. Not only is there nothing in the act indicating that its operation was intended to be retroactive, but it was not even given immediate effect, as would almost certainly have been the case if it had been intended to operate upon actions already commenced, or causes of action theretofore accrued. We understand the law to be well settled, as stated by Mr. Justice Cooley in his Constitutional Limitations, 370, that 'it is a sound rule of construction to give a statute a prospective operation only, unless its terms show a legislative intent that it should have a retrospective effect.' See also *Clark v. Hall*, 19 Mich. 369; *Smith v. Auditor General*, 20 Mich. 398; *Harrison v. Metz*, 17 Mich. 377.

"Indeed, we consider it extremely doubtful whether, if the law were intended to be retroactive, it would not be in conflict with the constitution. *Kay v. Railroad Co.*, 65 Pa. St. 269. *Wood, Retroactive Laws*, Sec. 172, and cases cited; *Bucher v. Railroad Co.*, 131 Mass. 156 *Frazier v. Tompkins*, 30 Hun. 168."

The observation made upon the delay respecting the time when the Act should take effect is probably quite suggestive in this instance.

While it is not possible to comment upon all the cases cited by counsel, the Court has not by any means overlooked the contention of the Railroad Company that Section 4679c of the Kentucky Statutes was the mere giving by the legislature to the Telegraph Company of the privilege of condemning to its use certain property under the conditions prescribed therein, and consequently that that privilege can be withdrawn at the pleasure of the legislature. In support of this very broad contention counsel for the Railroad Company cited the case of *Bridge Co. v. United States*, 105 U. S. 470. That case was much discussed at the argument of the case of *United States v. Louisville Bridge Co.*, 233 Fed. 270, when we became very familiar with its teachings. It may suffice to say respecting each of those cases that both bridge companies had been incorporated in Kentucky, each with power to construct a bridge over the Ohio river. That river being a navigable water, as such came under the general jurisdiction and control of the United States, and Congress having the power to regulate the navigation thereon, had enacted laws granting each bridge company the privilege of constructing a bridge over that river, but in that legislation the right was reserved of controlling structures so that they should not interfere with navigation. When they did so interfere the Secretary of War was given authority to require the removal or alteration of the structures. It was in no sense contemplated by Section 4679c of the Kentucky Statutes that any such situation as that should be created. On the contrary, that was a law providing for the exertion of the power of eminent domain in the interest of the public, and a utility corporation was authorized, but only upon condition of paying just compensation, to condemn to its uses certain property of private owners. This is a supreme right of any State, and is probably exercised by all of them, as well

251 as by the United States, when in the judgment of the legislative body of either sovereignty it is regarded as wise and best for the public interest that the power of eminent domain should be exerted.

Manifestly this is a situation entirely different from that respecting the bridge companies, and the case referred to can have no application to the Condemnation case here.

The Mandate of the Circuit Court of Appeals

The history we have given of the litigation now under consideration shows that there has been an appellate proceeding in the Condemnation Suit. As we have seen, the judgment of the court in that case was reversed with certain directions to be obeyed by the trial court. We suppose it must be presumed that the appellate court had judicial notice of the legislation involved at the time of the trial before that court of the writ of error. Furthermore that it had judicial knowledge of the jurisprudence of the State of Kentucky as well as the applicable federal laws. Yet with all those in presumed or possible contemplation, the mandate of that court was, not that the Condemnation case should be dismissed, but that a new trial thereof should be had pursuant to the opinion of that court. That opinion, as we all know, is now the law of that case, literally and fully, and it leads to the same result as to the other propositions discussed.

The conclusion must be in the Condemnation Suit—

First. That the demurrer to the plaintiff's amended reply should be carried back and sustained to the amended answer upon the grounds, (a) that its averments are those only of what the court has judicial knowledge and must take judicial notice of, and, therefore, that it is out of place in a pleading under Section 119 of the
252 Kentucky Code of Practice; and (b) that said amended answer states no fact which constitutes a defense to the petition in that proceeding; and,

Second. That the motion to dismiss the Condemnation Suit should be and is overruled and denied.

In Respect to the Injunction Suit.

The facts can not be ignored that the Condemnation Suit is still pending, and that the statute of Kentucky authorizing the Condemnation Suit has not been repealed in such way as to effect that proceeding. The reasons upon which the injunction was granted in the first instance remain in full force, though if any possibility of the protracted litigation in the Condemnation Suit had appeared at an earlier date a much greater penal sum might have been named in the injunction bond to cover damages to result from that delay. But be these things as they may, the court's conclusion is that the plaintiff's motion to strike out certain specified parts of the amended answer of the defendant should be sustained, and that the motion to dis-

sole the injunction in the Injunction Suit should be and it is denied.

Judgments accordingly will be entered in the respective suits.
April 30th, 1919.

WALTER EVANS,
Judge.

253

Order.

Entered April 30, 1919.

The Court being now sufficiently advised of the questions arising on the demurrer of the defendant to the plaintiff's reply to the amended and supplemental answer filed herein on February 15th, 1919, and those arising on the motion of the defendant to dismiss this action, delivered its opinion thereon in writing, which is filed, and pursuant thereto it is now considered, ordered and adjudged by the Court that said demurrer to the plaintiff's reply to the said amended and supplemental answer should be and the same is carried back and sustained to the said amended and supplemental answer, to which ruling of the Court the defendant excepts, and it is further ordered and adjudged by the Court that the motion of the defendant to dismiss this action should be and the same is overruled and denied, to which ruling of the Court the defendant also excepts.

April 30th, 1919.

Judge.

254

Motion to Enter Judgment.

Tendered December 18, 1920.

This day came the parties hereto, and defendant filed the written notice to plaintiff, duly accepted by plaintiff, and thereupon moved the Court to enter a judgment in this cause, and tendered a form of judgment which it moved the Court to enter.

H. L. STONE,
E. S. JOUETT,
HELM BRUCE,
Attys. for Deft.

255

Order.

Entered December 18, 1920.

This day appeared the defendant and filed a notice, accepted by counsel for the plaintiff herein, and moved the Court to enter a judgment dismissing the petition. It is ordered that this matter be passed over until Monday, December 20th, 1920.

PREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 259.

WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

vs.

Stipulation.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Defendant in Error.

It is hereby stipulated that in copying and printing the record in the above entitled cause, there was omitted a form of judgment tendered on December 18, 1920, and called for by the schedule, and which should immediately follow the motion on December 18, 1920, to enter same, which motion is found on page 184 of the printed record, and that the form of the judgment thus tendered was and is as follows, to wit:

"This day came the parties hereto, by counsel, and it appearing to the Court from the opinion of the United States Circuit Court of Appeals for the Sixth Circuit in the case of Louisville & Nashville Railroad Co. vs. Western Union Telegraph Co. on appeal from the decree of this Court in the Equity suit of Western Union Telegraph Co. vs. Louisville & Nashville Railroad Co. (2105) that said Circuit Court of Appeals has decided that the power of said Western Union Telegraph Co. to condemn the property of the Louisville & Nashville Railroad Co. sought to be condemned in this action was withdrawn by the State of Kentucky by the act of its General Assembly, approved March 14, 1916, heretofore pleaded in this action, and that said withdrawal took place before any rights had become vested in the Western Union Telegraph Co., and that this action or proceeding must, therefore, fail, it is now, therefore, ordered, adjudged and decreed by the Court that for said reasons the order heretofore entered overruling the motion to dismiss this action be, and it is hereby, set aside, and that this action for said reasons be, and it is now hereby, dismissed, and that defendant recover of plaintiff defendant's costs here-in expended, for which it may have execution."

ALEX'R POPE HUMPHREY,

For Plff. in Error.

HELM BRUCE,

For Deft. in Error.



256

Order.

Entered January 20, 1921.

This day appeared the plaintiff and tendered an Amended Reply herein and also tendered its objections in writing to the motion of the defendant to dismiss the action herein. The defendant appeared by counsel and filed its demurrer to the reply as amended and the Court not being sufficiently advised, it is ordered that all of said motions be submitted.

257

Judgment.

Entered January 22, 1921.

This day came the parties hereto by their respective counsel, and on motion of defendant it is now ordered that the orders entered herein on April 30, 1919, carrying defendant's demurrer to plaintiff's reply back to the amended and supplemental answer filed herein on February 15, 1919, and sustaining said demurrer to said amended and supplemental answer, and overruling defendant's motion to dismiss this action, be, and they are all hereby, set aside, to all of which plaintiff excepts.

The plaintiff then filed herein an amended reply, and also written objections to defendant's motion to dismiss this action.

And thereupon came defendant and filed a demurrer to plaintiff's said amended reply.

And the Court being now sufficiently advised, it is ordered and adjudged that said demurrer to said reply as amended be, and it is now sustained, to which plaintiff excepts, and thereupon plaintiff declined to plead further herein.

And, pursuant to its interpretation of the ruling of the Circuit Court of Appeals in this action it is now considered and adjudged by the Court that by the Act of the General Assembly of the Commonwealth of Kentucky entitled, "An Act to protect railroad companies in the use and enjoyment of their rights of way by forbidding the condemnation thereof," and for other purposes, approved

258 March 14, 1916, the power of the plaintiff herein to condemn or take any of the property or rights sought to be condemned and taken in this action, was withdrawn and taken away by said Act, to which ruling the plaintiff excepts. And accordingly it is now further considered and adjudged by the Court that at the time of such withdrawal of the right given by said Act no vested right had been acquired by plaintiff to any property or right sought by it to be condemned or taken herein, to which ruling of the Court the plaintiff excepts. And it is further considered and adjudged by the Court that no provision of said Act of March 14, 1916, violates or is in violation of the Constitution of Kentucky, and that no clause or provision of said Act is violative of the Constitution of the United States, nor of any amendment thereto, to each of which rulings the plaintiff also excepts. And it is further considered and adjudged by

the Court that plaintiff's petition herein should be and it is dismissed, to which the plaintiff excepts.

And it is further adjudged by the court that the defendant recover of the plaintiff the defendant's costs expended herein, as the same may be properly taxed by the Clerk, and that the defendant may have execution therefor, to which ruling the plaintiff also excepts.

Jan. 22, 1921.

259

Amended Reply.

Filed January 22, 1921.

The plaintiff amends its reply to the amended and supplemental answer of the defendant filed herein which pleads the Act of the Kentucky Legislature, approved March 14, 1916, and which went into effect June 12, 1916, and says:

That heretofore, to wit, on February 16, 1916, there was entered herein a judgment vesting in this plaintiff an easement over the right of way of the defendant as therein described; that the plaintiff, on the 8th day of March, 1916, paid into court the amount of said judgment and costs; that as appears herein, a writ of error was sued out from said judgment to the Circuit of Appeals, the bond executed upon said writ of error being expressly made without superseas; that the said judgment was reversed upon opinion delivered by the Circuit Court of Appeals, which has been made a part of this record, and following which there was an order upon the mandate of the said court.

The plaintiff now states that the force and effect of said judgment was to vest in the plaintiff a perpetual easement over the right of way of the defendant as therein described, and that by the payment into court of the amount of the awarded as herein-above mentioned, the said right became and was a vested right in the plaintiff to said easement over the right of way as therein described; that said vested right was in no way affected by the reversal of said judgment, the only effect of said judgment being to have a further inquiry as to the amount of compensation to be paid by the plaintiff to the defendant on account of its appropriation of said easement.

Plaintiff says:

260 (1) That the said Act, when properly construed with Section 465 of the Kentucky Statutes, does not apply to the proceedings in this case.

(2) That to apply the said Act to the proceedings in this case would be violative of the Constitution of the State of Kentucky and the Constitution of the United States, in that it would be an interference by the Legislature with judicial proceedings in court.

(3) That said Act if applied to this case, would be violative of the Constitution of the State of Kentucky and the Constitution of the United States, particularly the Fourteenth Amendment of said Constitution of the United States, in that it would deprive the plaintiff

its property without due process of law, and deny to the plaintiff the equal protection of the laws.

(4) That to apply this Act to these proceedings would be to divest the plaintiff of the right secured to it under said judgment, and so violative of said Constitution of the State of Kentucky and of the United States, particularly the Fourteenth Amendment of the Constitution of the United States, in that it would deprive the plaintiff of its property without due process of law, and deny to the plaintiff the equal protection of the laws.

Plaintiff therefore prays that the Court will hold said Act in no way applicable to these proceedings, and as unconstitutional and void.

W. O. HARRIS,
HUMPHREY, CRAWFORD &
MIDDLETON,

Attorneys for Plaintiff.

261 In the District Court of the United States for the Western
District of Kentucky, at Louisville.

No. 88.

WESTERN UNION TELEGRAPH CO., Plaintiff,

VS.

LOUISVILLE & NASHVILLE RAILROAD CO., Defendant.

Demurrer to Reply as Amended.

* * * * *

Defendant, Louisville & Nashville Railroad Co., demurs to the reply of plaintiff herein as amended, because same does not state facts sufficient to constitute or support a cause of action.

H. L. STONE,
E. S. JOUETT,
HELM BRUCE,

Attys. for Dft.

262 *Objections to Motion to Dismiss.*

Filed January 22, 1921.

The plaintiff, Western Union Telegraph Company, objects to the motion of the defendant, Louisville & Nashville Railroad Company, to dismiss these proceedings, and for ground therefor says:

That the said motion is based upon an Act of the Legislature of Kentucky fully set out in the amended answer of the Railroad Company herein, being an Act approved March 14, 1916, and entitled

"An Act to protect Railroad Companies in the use and enjoyment of their rights of way by forbidding the condemnation thereof for other purposes."

The plaintiff states, in addition to what it has heretofore set forth in its reply herein, that said Act is unconstitutional and void in that heretofore, to wit, on February 16, 1916, there was entered judgment herein vesting in the Telegraph Company an easement over the right of way of the Railroad Company as therein described and on the 8th day of March, 1916, the Telegraph Company paid into court the amount of the award, with costs.

There was thereupon and thereby vested in the Telegraph Company an easement as described in said judgment, and to deprive the plaintiff of said easement would be violative of the Constitution of the United States, particularly the Fourteenth Amendment thereof. The said Act is, under the Constitution of the United States, utterly void. And the Telegraph Company relies on said Constitution of the United States as herein set out, as well as on the Kentucky and Federal constitutional provisions as set forth in its reply heretofore filed herein.

OVERTON HARRIS,
HUMPHREY, CRAWFORD &
MIDDLETON,
For Plff.

264

Petition for Writ of Error.

Filed January 25, 1921.

To the Hon. Walter Evans, District Judge:

The above named Western Union Telegraph Company, being aggrieved by the judgment rendered and entered in the above entitled cause on the 22nd day of January, 1921, does hereby prosecute its writ of error from said judgment to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and said Western Union Telegraph Company prays that its writ of error be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and document upon which said judgment was based, duly authenticated, be sent to the Supreme Court of the United States, sitting in Washington, District of Columbia, under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order, relating to the required security to be required of it, be made.

HUMPHREY, CRAWFORD & MIDDLETON,
W. OVERTON HARRIS,

Counsel for Plaintiff.

District Court of the United States, Western District of
Kentucky.

No. 88.

WESTERN UNION TELEGRAPH COMPANY

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Assignment of Errors.

The plaintiff, Western Union Telegraph Company, states that the judgment entered herein January 22d, 1921, is erroneous, for the reasons herein set forth, which are hereby assigned as errors of the said court.

The court erred in dismissing the petition herein.

The court erred in holding that the Act of the Legislature of Kentucky pleaded by the defendant herein as having been passed March 14, 1916, and going into effect June 12, 1916, put an end to the right of the plaintiff to continue the prosecution of these proceedings.

The court erred in holding that the above named Act, when properly construed, applied to these proceedings.

The court erred in failing to hold that said Act was unconstitutional in that it was a legislative interference with a judicial proceeding, and violative in that respect of the Constitution of the State of Kentucky, and of the Constitution of the United States, and particularly the Fourteenth Amendment of the Constitution of the United States.

The court erred in failing to hold that the judgment entered herein February 16, 1916, having been satisfied by the payment of the amount of damages and costs on March 8, 1916, vested in the plaintiff an easement over the right of way of the defendant as herein described, and that said Act if it should be construed as applying to these proceedings would be violative of the Constitution of the State of Kentucky and of the Constitution of the United States, particularly the Fourteenth Amendment of the Constitution of the United States, in that if applied to these proceedings it would divest the plaintiff of a right vested in it by said judgment and the performance thereof, and in that way would constitute the taking of the property of the plaintiff without due process of law, and would deny to the plaintiff the equal protection of the laws.

5. The court erred in holding that the amended and supplemental answer of the defendant filed herein February 15, 1919,

was sufficient in law to put an end to the proceedings herein and to cause this suit to be dismissed; for that the said Act therein pleaded, if properly construed, is not applicable to this proceeding, and if construed as applicable to this proceeding is violative of the Constitution of the State of Kentucky and of the Constitution of the United States, especially the Fourteenth Amendment of the Constitution of the United States, in that it would deprive plaintiff of its property without due process of law, and deny to plaintiff the equal protection of the laws.

Wherefore plaintiff prays that said judgment be reversed and said District Court be required to enter an order reversing said judgment of said District Court; that the court will fix the bond with supersedeas to be executed by the plaintiff.

HUMPHREY, CRAWFORD & MIDDLETON,
W. OVERTON HARRIS,

Attorneys for Plaintiff.

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Bond on Writ of Error.

Filed January 25, 1921.

Know all men by these presents: That we, the plaintiff in error, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto the defendant in error, Louisville & Nashville Railroad Company, in the full and just sum of Three Thousand and 00/100 dollars (\$3,000.00) to be paid to the said defendant in error, its certain attorneys, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals, and dated this 25th day of January, in the year of our Lord One Thousand, Nine Hundred and Twenty-one.

Whereas, lately, to wit, on 25th day of January 1921, at a District Court of the United States for the Western District of Kentucky, in a suit pending in said court between Western Union Telegraph Company, plaintiff, and Louisville & Nashville Railroad Company, defendant, a judgment was rendered against the said Western Union Telegraph Company, and the said Western Union Telegraph Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said Louisville & Nashville Railroad Company, citing and admonishing it to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, District of Columbia, on the 23rd day of February 1921,

Now, the condition of the above obligation is such that if
268 the said Western Union Telegraph Company shall prosecute said writ of error to effect and answer all damages and costs, if it fails to make the said plea good, then the above obligation is to remain in full force and virtue.

Sealed and delivered in the presence of:

WESTERN UNION TELEGRAPH COMPANY,
By HUMPHREY, CRAWFORD & MIDDLETON,
W. OVERTON HARRIS, *Principal*,
AMERICAN SURETY COMPANY OF NEW
YORK. [SEAL.]

By H. McGEE,
Attorney in Fact.

The premium on the bond is 10.00 per thousand.
Total premium charged 30.00.

Order Allowing Writ of Error.

Entered January 25, 1921.

This 25th day of January, 1921, came the plaintiff by its attorneys and filed herein and presented to the court its petition, praying for the allowance of a writ of error, accompanied with an assignment of errors intended to be urged by it; praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered on January 22nd, 1921, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court does allow the writ of error upon the plaintiff's giving bond according to law in the sum of Three Thousand Dollars, said bond to operate as a supersedeas.

Whereupon the plaintiff, with the American Surety Company as surety, executed a bond in the sum and as required by the foregoing order, which bond and surety are approved by the court.

District Court of the United States for the Western District
of Kentucky.

No. 88.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
v.

LOUISVILLE and NASHVILLE RAILROAD COMPANY, Defendant in
Error.

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the (District) Court of the United States for the Western District of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you,

or some of you, between Western Union Telegraph Company, plaintiff, and Louisville and Nashville Railroad Company, defendant, a manifest error hath happened to the great damage of the said plaintiff, Western Union Telegraph Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

271 Witness the Honorable Edward Douglass White, Chief Justice of the said Supreme Court, the 25th day of January, in the year of our Lord one thousand nine hundred and twenty-one.

Allowed by

WALTER EVANS,
United States District Judge.

[SEAL.]

Attest:

A. G. RONALD,

*Clerk of the District Court of the United States
for the Western District of Kentucky.*

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Citation.

UNITED STATES OF AMERICA,

*Western District of Kentucky,
Sixth Judicial District, ss:*

To Louisville & Nashville Railroad Company:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the City of Washington, District of Columbia, on the 23rd February, 1921, pursuant to a Writ of Error allowed by the District Court of the United States for the Western District of Kentucky, wherein Western Union Telegraph Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this the 25th day of January in the year of our Lord one thousand, nine hundred and twenty-one, and of the independ-

ence of the United States of America the one hundred and forty-fifth.

WALTER EVANS,
U. S. District Judge.

Received this Citation and one copy at Louisville, Ky., February 19, 1921, and served same at Louisville, Ky., Feb. 19, 1921, on the Louisville & Nashville Railroad Company by delivering a true copy hereof to Helm Bruce, Attorney for said Company.

This February 19, 1921.

E. H. JAMES,
United States Marshal.

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Plaintiff's Præcipe.

Filed February 19, 1921.

To Hon. A. G. Ronald, Clerk of the United States District Court of the Western District of Kentucky:

Please prepare forthwith a certified transcript of the record in the above styled case for the writ of error, prosecuted by this plaintiff in error, of the judgment entered on January 22nd, 1921, which record shall consist of the following:

Petition of Plaintiff for Condemnation filed July 9, 1912.

Order filing Demurrers to Petition entered October 14, 1912.

Special Demurrer to Petition filed October 14, 1912.

General Demurrer to Petition filed October 14, 1912.

Order on Demurrers entered October 24, 1912.

Order filing Answer to Petition entered November 2, 1912.

Answer of Defendant filed November 2, 1912.

Exhibit A, with Answer.

Exhibit B, with same.

Exhibit C, with same.

Exhibit D, with same.

Order filing Demurrer to Answer entered November 12, 1912.

Contract between Plaintiff and Defendant, executed June 18, 1884.

Order submitting Demurrers to Answer, entered December 3, 1912.

Opinion on Demurrers to Answer, filed December 17, 1912.

Order on Demurrers to Answer, entered December 17, 1912.

Order filing Amended Answer, December 28, 1912.

Amended Answer filed December 28, 1912, with Second Paragraph thereof omitted.

Exhibit F, with Amended Answer, filed December 28, 1912.

Exhibit G, with same.

Order filing Reply, Demurrer to Amended Answer, and Motion to Strike from First Paragraph of Original Answer, entered January 4, 1913.

Reply to Thirteenth Paragraph of Original Answer, filed January 4, 1913.

Demurrer to Amended Answer, filed January 4, 1913.

Opinion on Demurrer to Amended Answer and Motions to Strike parts of Original Answer, filed January 27, 1913.

Order ruling on Demurrers and Motions to Strike, entered January 27, 1913.

274 Order filing Amended Petition, and Motion to Strike parts thereof, entered March 10, 1913.

Amended Petition, filed March 10, 1913.

Motion to Strike part of Amended Petition, entered March 10, 1913.

Order filing Opinion and overruling Motion to Strike parts of Amended Petition, entered March 11, 1913.

Opinion on Motion to Strike, filed March 11, 1913.

Order filing Amended Petition, Answer to Amended Petition, Motion to Dismiss Petition, and empaneling jury, entered March 12, 1913.

Amended Petition, filed March 12, 1913.

Answer to Amended Petition, filed March 12, 1913.

Order filing Amended Petition, entered March 20, 1913.

Amended Petition, filed March 20, 1913.

Order tendering Amended Petition, March 29, 1913.

Order filing Amended Petition, entered March 31, 1913.

Amended Petition, filed March 31, 1913.

Order concerning Arguments of Counsel to Jury, entered April 1, 1913.

Order concerning Court's Charge to Jury, entered April 2, 1913.

Judgment on Verdict of Jury, entered April 3, 1913.

Order filing Plaintiff's Motion for New trial, entered May 3, 1913.

Petition of Plaintiff for New Trial, filed May 3, 1913.

Order extending time to parties to file Bill of Exceptions and payment of Jury's Award, entered June 23, 1913.

Order filing Opinion sustaining Plaintiff's Motion for New Trial and granting 60 days' time to defendant to file Bill of Exceptions, entered December 13, 1913.

Memorandum Opinion on Motion for New Trial, filed December 13, 1913.

Order filing Amended Petition, entered March 9, 1914.

Amended Petition, filed March 9, 1914.

Order entered April 15, 1914, reciting Stipulation between Counsel concerning Amended Petition, filed March 9, 1914.

Order filing Answer to Amended Petition, entered April 18, 1914.

Answer to Amended Petition, filed April 18, 1914.

275 Order setting Case for Trial May 20, 1915, entered January 15, 1915.

Order by Agreement re-assigning Case for Trial October 20, 1915, entered May 20, 1915.

Order filing Amended Answer, entered October 7, 1915.

Amended Answer filed October 7, 1915.

Order entered October 11, 1915, continuing Case for Trial on Defendant's Motion to January 19, 1916.

Amended Petition filed November 20, 1915.

Order filing Plaintiff's Motion that the Court hear evidence and determine certain questions, without a jury, December 15, 1915.

Motion of Plaintiff therefor, entered December 15, 1915.

Order concerning Argument on said Motion, entered December 18, 1915.

Opinion on Plaintiff's Motion that the Court hear evidence and determine certain questions filed December 20, 1915.

Order sustaining said Motion, entered December 20, 1915.

Order filing Amended Petition, Motions, etc., entered January 19, 1916.

Amended Petition, filed January 19, 1916.

Motion to require Plaintiff to make Petition more definite and certain, entered January 19, 1916.

Demurrer January 19, 1916, to Second Paragraph of Amended Petition, filed March 31, 1913.

Motion January 19, 1916, to Strike Second Paragraph of Amended Petition, filed March 31, 1913.

Order January 20, 1916, sustaining Motion to Strike Second Paragraph of Amended Petition, filed March 31, 1913.

Amended Answer tendered and offered to be filed, January 20, 1916.

Orders concerning the hearing of evidence by the Court, January 22-24, 1916.

Order concerning Argument of Counsel on questions submitted to the Court, January 24, 1916.

Finding of Facts separately from Opinion, filed January 29, 1916.

Order in pursuance of Opinion and Finding of Facts, entered January 29, 1916.

Order on Defendant's Motion for View by Jury of the premises sought to be condemned, entered January 31, 1916.

Affidavit of W. H. Courtenay in support of Motion for View by jury.

Opinion on Motion to Direct the Jury to View the Right of Way, filed February 8, 1916.

Renewal of said Motion and Order overruling same, February 8, 1916.

Order filing Amended Petition, impaneling Jury, and Statement of Case by Counsel, February 8, 1916.

Amended Petition filed February 8, 1916.

Orders concerning Jury Trial, February 9-15, 1916.

Directed Verdict of Jury, returned February 16, 1916.

Judgment entered February 16, 1916, to reverse which Writ of Error is prosecuted.

Order paying amount of Judgment and Costs into Registry of the Court, March 8, 1916.

Order extending time for Defendant to file Bill of Exceptions pertaining to trial by the Court, entered March 25, 1916.

Order nunc pro tunc, entered April 15, 1916.

Order April 15, 1916, filing defendant's assignment of errors, etc.

276 Order extending time to file bill of exceptions until June 15, 1916.

Order extending time until and including June 22, 1916, for filing bills, etc.

Order filing bills of exceptions Nos. 1 and 2 (but not the bills themselves).

Opinion of Circuit Court of Appeals, rendered April 2, 1918.
Assignment of Errors.

Order allowing Writ of Error, entered June 29, 1916.

Bond on Writ of Error approved June 29th, 1916.

Writ of Error issued June 29th, 1916.

Order of December 7, 1918, of the Mandate and Opinion.

Order of December 19, 1918, entering Motion to set aside the Order of December 7, 1918.

Opinion and Order entered December 21st, 1918, overruling the Motion to set aside the Order of December 7, 1918.

Order of February 15th, 1919, filing Amended and Supplemental Answer, and Amended and Supplemental Answer, itself, and Order of Circuit Court of Appeals and Order filing.

Order of March 10, 1919, filing Reply to Amended and Supplemental Answer, and the Reply, itself.

Order of March 10, 1919, filing Demurrer to Reply, and the Demurrer, itself.

Motion of April 11, 1919, to Dismiss the Action.

Opinion and Order of April 30, 1919, sustaining Demurrer to Amended and Supplemental Answer.

Exceptions of the defendant entered April 30, 1919.

Motion of December 18, 1920, to enter Judgment, and Judgment tendered.

Motion of January 20, 1921, tendering Amended Reply, etc.

Order of January 20, 1921, tendering Amended Reply & the Amd. Reply itself.

Demurrer of January 20, 1921, to Amended Reply.

Judgment entered January 22, 1921.

Petition for Writ of Error filed January 25, 1921.

Writ of Error filed January 25, 1921.

Assignment of Errors filed January 25, 1921.

Bond filed January 25, 1921.

Order allowing Writ of Error entered January 25, 1921.

Citation issued January 25, 1921.

Præcipe filed February 19, 1921.

HUMPHREY, CRAWFORD & MIDDLETON,
W. O. HARRIS,

Counsel for Western Union Telegraph Company.

Service of this Præcipe on Defendant is hereby acknowledged this Feby. 17, 1921.

HELM BRUCE,
Atty. for Louisville & Nashville Railroad Company.

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Entry.

Entered February 19, 1921.

This day the defendant, Louisville & Nashville Railroad Company, by its counsel, Helm Bruce, Esq., appeared, and in writing tendered asked the court's leave to file in this action a motion to set aside the judgment entered in the above-styled action on January 22, 1921, and the orders entered therein upon the 25th day of January, 1921, allowing a Writ of Error and approving a bond in said cause, and moved the court to permit defendant to withdraw its demurrer filed to plaintiff's reply as amended and to file in lieu thereof a rejoinder to said reply and an exhibit therewith, which rejoinder and exhibit were tendered with said motion.

But inasmuch as on January 25th, 1921, a writ of error had been allowed by the court in this action pursuant to which on that day a bond had been executed with surety accepted and approved by the court, and that thereupon a writ of error had, on that day, been issued and a citation thereon had, on that day, been served upon the defendant, the court is of opinion that the motion now sought to be made can not be interposed or granted at this time because, 1st, objection is made by the plaintiff, and, 2nd, because in many previous cases this court has held that its jurisdiction over the case had ceased and had passed to a higher court. Besides so deciding those cases, it has done so in this case in its opinion delivered herein December 21st, 1918.

Accordingly the court must pursue the same course in this instance, and decline to entertain or to pass upon the motion
278 so tendered by the defendant, as this case has passed beyond its jurisdiction.

To this ruling the defendant excepted and asked the court's leave to file a bill of exceptions, which leave was granted, and said bill of exceptions was tendered and is now approved by the court and filed herein.

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Order.

Entered February 19, 1921.

This day came the plaintiff by counsel, and the defendant also being present by counsel, plaintiff shows to the Court that it has been endeavoring to agree with the defendant as to what should constitute the record in this case to be transmitted on the writ of error to the Supreme Court of the United States, and has been using due diligence to this end; that not being able to agree the plaintiff has filed with the Clerk a præcipe under Rule 8 of the Supreme Court; that the defendant is entitled to ten days to indicate such additional portions of the record as are desired by it, and in view of this fact it is impossible to have the record completed by the 23rd of February, the date set in the original citation issued herein.

And thereupon on motion of the plaintiff further time is given to it to file said record until March 19, 1921.

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Defendant's Præcipe.

Filed Feb. 19, 1921.

The Clerk in making the copy of the record for the Supreme Court in the above case will copy also for defendant the proceedings had and papers filed or tendered on February 19, 1921, and any order the court shall make on that day or thereafter on the motions made that day and any paper the court may order to be filed.

HELM BRUCE,

For Defendant.

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Bill of Exceptions.

Filed February 19, 1921.

Be it remembered, that on this 16th day of February, 1921, being during a continuance of the October, 1920 term of this court, came the Louisville & Nashville Railroad Company and filed a notice duly accepted by counsel for plaintiff, Western Union Telegraph Company, and pursuant to said notice moved the court to set aside the judgment entered in the above styled action on January 22, 1921 and the orders entered therein upon the 25th day of January, 1921, allowing a Writ of Error and approving a bond in said cause, and moved the court to permit defendant to withdraw its demurrer filed to plaintiff's reply as amended and to file in lieu thereof a rejoinder to said reply and an exhibit therewith, which rejoinder and exhibit were tendered with said motion.

To said motion plaintiff objected, and the court being sufficiently advised, in an entry made stating its reasons therefor, overruled said motion and refused to permit said pleading or exhibit to be filed, to which defendant excepted.

The said notice, rejoinder and exhibit with rejoinder are as follows:

Notice.

The plaintiff will take notice that on February 19, 1921, defendant will move the Court to set aside the orders heretofore entered herein allowing a writ of error and approving a bond and also to set aside the judgment entered herein on January 22, 1921 and to permit plaintiff to withdraw its demurrer to the reply as amended and to file in lieu thereof a rejoinder to said reply and will tender said rejoinder with said motion and of which rejoinder a copy is annexed hereto.

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H. L. STONE,
HELM BRUCE,
E. S. JOUETT,*Attorneys for Defendant.*

Notice acknowledged this Feb. 15/21.

ALEX. P. HUMPHREY.

Motion.

This day comes defendant, Louisville & Nashville Railroad Company, in the above entitled cause, being within the term during which the proceedings hereinafter mentioned were had, and files a notice duly accepted by counsel for plaintiff, Western Union Telegraph Company, and now moves the Court to set aside the judgment entered herein on January 22, 1921 and the orders entered upon the 25th day of January, 1921, allowing a writ of error and approving a bond in said cause, and moves the Court to permit defendant to withdraw its demurrer filed to plaintiff's reply as amended and to file in lieu thereof a rejoinder to same, and an exhibit therewith, which is tendered herewith; the purpose of this procedure being to bring before the Supreme Court at one time all the questions in this litigation that can now be properly presented for decision.

H. L. STONE,
E. S. JOUETT,
HELM BRUCE,

For Deft.

Rejoinder.

Defendant, for rejoinder to the reply herein as amended, denies that the judgment entered on February 16, 1916, pleaded in the amended reply, vested in plaintiff an easement over the right of way of defendant therein described, or that such right became a vested right by the payment into Court of the amount of the award referred to.

283 Defendant says that in a suit in equity pending in this Court, wherein the Western Union Telegraph Company, which is the plaintiff herein, was and is plaintiff, and the Louisville & Nashville Railroad Co., which is the defendant herein, was and is the defendant, said Western Union Telegraph Co. sought to enjoin said Louisville & Nashville Railroad Co. from interfering with said plaintiff's possession and use of the right of way of defendant described in the pleadings and other proceedings herein until said Telegraph Company could complete the condemnation of said right of way in this action. And said plaintiff obtained a preliminary injunction in said suit as prayed for. But subsequently, and after the passage by the General Assembly of Kentucky of the act approved March 14, 1916 entitled "An Act to protect Railroad Companies in the use and enjoyment of their rights of way by forbidding the condemnation thereof," referred to in plaintiff's amended reply, defendant pleaded in said equity suit the passage of said act and moved the Court to dissolve the injunction which had been previously granted, because said act had withdrawn the power of condemnation from plaintiff and it no longer had any power to condemn the said property sought to be condemned.

Plaintiff objected to said motion and on the hearing thereof read in evidence the judgment of this Court in this condemnation case of February 16, 1916, referred to in its amended reply herein, and also

the order showing its payment into Court on March 8, 1916 of the amount of said judgment and costs; and insisted that its right to condemn the property sought to be condemned in this present action had not been withdrawn.

This Court overruled defendant's motion to dissolve said injunction. And thereupon defendant took an appeal to the United States Circuit Court of Appeals for the Sixth Circuit from the order overruling its said motion to dissolve.

When the case came on for hearing in the United States Circuit Court of Appeals on said appeal, both parties united in the request to the Court that it decide upon that appeal the question of the effect of the said act of March 14, 1916 upon the pending condemnation proceeding, without regard to the fact that said question might be raised somewhat more directly in the condemnation case itself. And said appeal having been heard and submitted the said Circuit Court of Appeals delivered and filed a written opinion on July 29, 1920 reversing the order appealed from and directing such injunction to be dissolved so far as applicable to lines in Kentucky.

284 Thereafter said Telegraph Co. filed a petition for rehearing and supplemental petition for rehearing in said Circuit Court of Appeals, to which the Railroad Company filed a response; and said cause having again been submitted on said petition and supplemental petition for rehearing and the response thereto, the said Circuit Court of Appeals on October 15, 1920 denied said petition for re-hearing and at that time delivered an additional opinion.

Said two opinions bound together are filed herewith as an exhibit marked "Exhibit with Rejoinder."

In said proceeding said Circuit Court of Appeals adjudged that by said act of the General Assembly of the Commonwealth of Kentucky, approved March 14, 1916, the power of the plaintiff herein to condemn or take any of the property or rights sought to be condemned and taken in this action was withdrawn and taken away from plaintiff, and that at the time of such withdrawal no vested right had been acquired by plaintiff herein to any right of property sought by it to be condemned or taken herein.

After the denial by the Circuit Court of Appeals of the said petition for re-hearing the said Telegraph Company filed in the Supreme Court of the United States a petition for a certiorari seeking to review the action of the said Circuit Court of Appeals, but said petition for certiorari was denied. And thereafter the said Circuit Court of Appeals issued its mandate to the District Court in conformity with its aforesaid ruling; which mandate was filed in this the District Court which has entered an order of dissolution of said injunction in conformity with said mandate and opinions.

Plaintiff therefore pleads said adjudications as conclusive between plaintiff and defendant of the questions decided thereby and in bar of the exercise of the power sought to be exercised by plaintiff herein and of the right asserted by plaintiff herein.

H. L. STONE,
E. S. JOUETT,
HELM BRUCE,
Counsel.

M. H. Smith says he is President of defendant, Louisville & Nashville Railroad Co. and that the statements in the foregoing pleading are true.

M. H. SMITH.

Subscribed and sworn to before me by M. H. Smith this February 15, 1921.

285 My commission expires October 9, 1923.
[SEAL.] LEO T. WOLFORD,
 Notary Public, Jeff Co., Ky.

EXHIBIT WITH REJOINDER.

No. 3320.

United States Circuit Court of Appeals, Sixth Circuit.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,

vs.

WESTERN UNION TELEGRAPH COMPANY, Appellee.

Appeal from the District Court of the Western District of United States for the — Kentucky.

Submitted February 11, 1920.

Decided July 29, 1920.

Before Knappen, Denison and Donahue, Circuit Judges.

DENISON, *Circuit Judge*:

Pursuant to a Kentucky statute of 1898 (Ky. St., Sec. 4679c), the Telegraph Company, in December, 1911, began a proceeding to condemn an easement for a line of telegraph poles and wire over and along the right of way of the Railroad Company within the State of Kentucky. The details of the situation involved are fully stated in the opinions of this court in the suits between the same parties, reported in 207 Fed., 1; 249 Fed., 385 and 252 Fed., 29. The condemnation proceeding came to a trial upon the law side of the court below, and resulted in a judgment of condemnation and an award of damages to be paid by the Telegraph Company to the Railroad Company in the sum of \$500,000. The District Court granted a new trial. Upon the second trial, there was again a judgment of condemnation, and the damages were fixed, by direction of the court and upon the theory that only nominal damages could be recovered, at the sum of \$5,000. This judgment was entered on February 16, 1916. On March 18, 1916, the Telegraph Company paid into the registry of the court the amount of this judg-

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ment and costs. A writ of error from this court was allowed, on June 19, 1916, and on May 8, 1918, this court entered judgment reversing the judgment of the District Court and remanding the cause with instructions to award a new trial generally upon the subject of compensation and to some extent upon the subject of necessity (249 Fed., 385, 403). In March, 1919, the Railroad Company tendered and filed in the injunction suit (207 Fed., 1; 252 Fed., 29), a supplemental answer, alleging that the act of 1898, upon which the condemnation suit rested, had been repealed, and that further prosecution thereof would be in violation of the law. It thereupon moved to dissolve the existing injunction, so far as this pertained to Kentucky. It also filed, in the condemnation case, a motion for dismissal upon the same ground. The motion to dissolve the injunction as to Kentucky was denied, and the Railroad Company brings this appeal. The substantial question involved is whether the repeal of the 1898 law was effective as against this pending proceeding, and all parties agree that this question may be considered and decided upon this appeal, without regard to the fact that it might be raised somewhat more directly in the condemnation case itself.

The repealing law was passed June 12, 1916. It is given in the margin (1). It is so plain that the interests of the owner are not "taken," at least until the effective judgment of condemnation, and the language of this act of 1916 so explicitly forbids the taking of such an interest as is being sought in this condemnation proceeding, that it seems to have been taken for granted, in 287 the court below as here, that the condemnation suit must fail (2) unless for one of the two special reasons urged against giving this new statute its seeming full effect. The first is that by the force of a general rule of construction embodied in the Kentucky statutes, the act of 1916 should not be construed as intended to reach pending cases; the second is that, if the legislature did so intend, it had not the constitutional power.

(1) "An act to protect Railroad Companies in the use and enjoyment of their rights of way by forbidding the condemnation thereof for other purposes.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"Sec. 1. That no part of the right of way of any railroad company, or any interest or easement therein, shall be taken by any condemnation proceedings, or without the consent of such railroad company, for the use or occupancy of any part of such right of way, on, over and along such right of way longitudinally, by any telegraph, telephone, electric light, power, or other wire company, with its poles, cables, wires, conduits, or other fixtures; provided, that nothing in this section shall be construed as preventing any such wire company from obtaining the right to cross the right of way of a railroad company, under existing laws in such manner as not to interfere with the ordinary use or ordinary travel and traffic of such railroad company's railroad.

"Sec. 2. That all acts and parts of acts in conflict with this act be and the same are hereby repealed." (3 Carroll's Kentucky Statutes, Sec. 8406; Ky. Session Acts, 1916, Chapter 15, page 69.)

(2) Lewis on Em. Dom., 3rd ed., Sec. 380; Boone v. Snyder, 9 Ky. App. 921; Commonwealth v. Ewald, 153 Ky., 116.

(3) If there were doubt about this, it would be resolved by the Pannell case, *infra.*, where suit was pending, but the "right" or "claim" was held not to be saved by Sec. 465.

Section 465 of the Kentucky statutes, says, so far as now pertinent, "No new law shall be construed to repeal a former law as to * * * any right accrued, or claim arising under, the former law, or in any way whatever to affect * * * any right accrued or claim arising before the new law takes effect * * *." So far as concerns the claim that the pendency of a judicial proceeding as to the existing right or conditions is a controlling consideration, it will be apparent that this section (465) makes no direct reference to that subject. It does not say that no new law shall be construed to repeal another so as to affect any proceeding pending, but speaks only with reference to its effect upon any "right secured or claim arising under the former law" or "any right accrued or claim arising before the new law takes effect." Those "rights" or "claims" which are thus exempted might or might not be involved in pending judicial proceedings; that would be as it happened; but the exemption would be the same in either case (3). In applying this statute (Sec. 465) here, we must lay aside the fortuitous fact that judicial proceedings were pending, and consider merely whether the Telegraph Company's proposition that it could acquire this easement against the will of the Railroad Company was a "right accrued or claim arising under the former law;" and this is much the same question hereafter considered under the other branch of the case.

In any event, Sec. 465 does no more than lay down a canon of construction for doubtful cases. Except so far as it may embody the constitutional principle that vested rights may not be destroyed, it could not, if it would—and quite clearly it does not attempt to—make invalid any future act which should be made to repeal expressly a former law "as to rights accrued and claims arising" thereunder. It is only when the language of an act is vague and general and might or might not fairly be taken to show an intent to affect a situation which had arisen under a former law, that the courts would go to Sec. 465 to get a rule of construction.

We cannot find in the statute of 1916 any ambiguity which authorizes reference to Sec. 465. Section 2 of the act repeals all former laws, and if it stood alone, there would be force in suggesting a resort to Sec. 465; but Sec. 1, in the most express language, forbids the rendering of the judgment which is demanded in the condemnation case. It says, "no part of the right of way * * * or any interest or easement therein shall be taken by any condemnation proceeding * * * by any telegraph company, etc." Whether or not it can be assumed that the legislature had this particular condemnation in mind, we think that the intent to stop every such in-mature proceeding, whether initiated or not, is too clear for doubt; Sec. 2 alone would do everything except arrest a case pending; Sec. 1 could have had no purpose except that. Thus, we must come to the question of power.

The right of eminent domain is an attribute of sovereignty. The moment it is thought of as a private right, it ceases to exist. It is none the less a public right, because the state sometimes consents that it may be exercised by a quasi-public corporation, like a common

carrier. Such license or permission is granted because its exertion in that form is thought to be for the public interest. The statute of 1898 does not grant to or vest in the telegraph companies any property right. It permits them to proceed in their own names, but really on behalf of the state, with the preliminary proceedings determine whether the condemnation is for the public interest, and to fix the amount of the damages, and then allows them to take the interest in question; but, certainly nothing is "taken," until the judgment is obtained and its condition performed. Until that time the telegraph company has only a license to exercise, as the agent of the state, a portion of the sovereign power of the state. Even an express provision in such a statute that a subsequent legislature could not recall the permission and cancel the license if the *septs* preliminary to taking had been commenced but had not ripened into a private right, would doubtless be invalid, because one legislature cannot limit the governmental power of its successor. The ordinary rules of mutuality lead to the same result. The condemnor may abandon the proceedings, if *he* thinks the award is too high. Can the state be irrevocably bound when its licensee has only a
 289 option? These considerations lie at the base of the matter now involved and are so familiar that they need only be stated.

The subject matter involved is the easement over the railroad right of way. We do not see how it can be claimed that the Telegraph Company, by filing its petition for condemnation and going to trial on the issue, acquired any right to, or interest in, this easement. The language of the statute is that it shall "have the right to construct and maintain its line along the railroad right of way, when?" "Upon making just compensation as hereinafter provided that is to say, after obtaining a judgment and paying the fixed amount. Until that time, the statute does not purport to grant any right.

Nor can we think that any new existing right was acquired by the payment into court of the amount of the judgment. That judgment was reversed. With exceptions not here important, a judgment which is reversed and set aside is as if it had never been. When plaintiff recovers a judgment upon conditions, he surely cannot, by immediate performance of the conditions, deprive the defendant of the right to go to the reviewing court and get the judgment set aside; yet, to this point necessarily comes the claim that by paying the judgment into court, plaintiff acquired some kind of an interest which was vested so that it was entitled to protection there. Upon the new trial which was awarded, there might ordinarily be a judgment that there could be no condemnation at all; and although there was a complete new trial ordered here only as to compensation, the next jury might fix an amount which the Telegraph Company would not pay.

When the judgment and payment of February and March, 1916, are put out of view, it becomes clear that such inchoate claim as the Telegraph Company had to this right of way on June 12, 1916, was not such a vested property right or interest as is reached and pro-

ected by the "due process" clause of the Fourteenth Amendment to the Constitution of the United States, or the corresponding clause of the Constitution of Kentucky, but was rather a claim, the continued existence of which was contingent upon the existence of the supporting statute, and that when the statute was repealed, the inchoate right fell with it (*Baltimore Co. v. Nesbitt*, 10 How., 395, 398; *Garrison v. New York*, 21 Wall., 196, 205; *Marion v. Louisville Co.*, 90 Ky., 491, 495; *Sandy Valley v. Elkhorn Co.*, 161 Ky., 555, 559).

It is sought to escape from this hardly questioned general rule by force of the fact that the Telegraph Company was in possession of the easement when the repealing statute was passed. If this possession had been acquired through or even in contemplation of the condemnation proceedings, it would be necessary to consider its force, but that was not the character of the Telegraph Company's possession. It had been acquired by contract with the Railroad Company many years before, and when the contract right expired, the Telegraph Company had continued to stay in possession without any surrender or reacquirement. It is true it had obtained the aid of an injunction to maintain this possession pending the condemnation, but this injunction is in no way equivalent to an ouster and reentry; it was rather collateral to the continuing, undisturbed possession which the Telegraph Company had acquired under a right foreign to any thought of condemnation (See 249 Fed., 385, 395); such a possession cannot be thought of as a "right" which gives the Telegraph Company any better standing in the condemnation proceedings than it would otherwise have.

In concluding that, when the repealing act was passed, the Telegraph Company had acquired no "right" to condemnation, in any pertinent sense of that word, we do not overlook the line of cases holding that one who commences a proceeding to condemn acquires thereby a priority of right as against a junior condemnor, who perhaps seeks to better his position by taking a deed from the owner (*Cumberland v. Pine Mt.*, 28 Ky., L. R. 574; *Sioux City v. Chicago*, 27 Fed., 774; *Lewis' Em. Dom.*, 3rd ed., p. 905). That there is such a priority of right as between two claimants, does not persuade that *eight* one of them has that kind of a right which will survive the repeal of the statute on which both are based.

The main reliance, however, of counsel for the Telegraph Company in this court and of the court below in its careful opinion, is the proposition that the legislature of Kentucky has no power to change the status of the parties in any pending litigation. This proposition does not depend on any express provision of the constitution of the state, but on an implied prohibition said to be established by the Kentucky courts; and in examining whether such a prohibition exists, it must be remembered that, to be effective here, it is to be broad enough to extend to cases where no vested right is impaired—for this is such a case.

It must also be remembered that, in reviewing the decisions of the Supreme Court of a state upon a state law as well as in considering those of the Supreme Court of the United States upon a federal law,

we are bound only as to the very point decided, and not by general language extending further. In the familiar words of Chief Justice Marshall, in *Cohens v. Virginia*, 6 Wheat., 264, 339: "General expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of the maxim is obvious, etc."

There are said to be nine Kentucky decisions supporting 291 the proposition. They are cited in the margin (4). A careful study of them shows the error of this contention—at least, so far as concerns the present applicability of the proposition. They all purport to be based upon *Guines v. Guines*; but the only matter there really decided was that the legislature could not invade the province of the judiciary and change the rights of one specific person after the controversy had arisen which fixed those rights. The fact that litigation was pending as to these rights, was mentioned by the court; but this was a convenient manner of reference to the fact that the rights had become either vested rights in the full sense of that term, or at least so fixed that it had become a judicial function to examine and determine what they were. Substantially the same situation existed in each of the other cited cases in which the legislation was held unlawful; the question was one of infringement by the legislature upon the judiciary. The most that can be said of these cases, when decisions are distinguished from dicta, is that retroactive authority to lay a tax has been held bad in some cases where litigation was pending on the subject, and good where there was no suit in progress. This (possibly) anomalous result may depend on the peculiar character of the rights and powers involved (see decision in *Marion v. Louisville*). However, if we concede the existence of a rule on this subject, peculiar to Kentucky, it does not reach the present case. It is concisely stated in *Turner v. Pewee Valley*, where the opinion says: "This court has repeatedly held that no legislation can affect the rights of parties litigant enacted after the institution of the suit." As we have pointed out, the matter here involved was not a right in the sense in which that term is used in any of these cited opinions; it was a revocable license; and we are satisfied that the Court of Appeals of Kentucky never intended to, and never did, pass upon the real question here involved until it decided the case of *Pannell v. Louisville Co.*, 113 Ky., 630. It there appeared that a statute regulating the conduct of warehousemen provided penalties for its violation, and it also provided that the party injured might bring an action and recover for his own benefit the prescribed penalty. Such a penalty had accrued and the party had brought an action, when the legislature repealed the statute. Upon full consideration, it was held that the right of

(4) *Guines v. Guines*, 9 B. M., 295; *Cabell v. Cabell's Admr.*, 1 Mete. (Ky.), 319; *Hedger v. Rammaker*, 3 Mete. (Ky.), 255; *Allison v. L. H. C. & W. Ry. Co.*, 9 Bush, 247; *Allison v. Railway*, 10 Bush, 1; *Thweatt v. Bank of Hopkinsville*, 81 Ky. 1; *Norman v. Boaz*, 85 Ky., 557; *Marion County v. L. & N. R. Co.*, 91 Ky., 388; *Turner v. Town of Pewee Valley*, 100 Ky., 288.

the plaintiff to recover had not been saved either by the legislature's lack of power to remit an accrued penalty or by the effect of Sec. 465 in saving existing rights. It is true that the court did not, in terms, refer to the constitutional limitation now invoked (a strange omission, if it is as far-reaching as is claimed), but we can see no distinction between that case and this, in the principles involved. The right to impose a penalty upon a citizen who disobeys the law, like the right to take a citizen's property by eminent domain, is a right of sovereignty. In either case, the state, in pursuit of its public policy, may delegate to a citizen power to exercise the right; in either case, the person to whom the right is delegated becomes a licensee and may thereupon proceed in execution of the power; but, in either case, the power may be withdrawn pending the incomplete attempt to execute it. Not only that, but the statutes involved in the two cases are so similar in form as to suggest that the repealing law in the condemnation matter was adopted from the repealing law in the warehouse matter. In each case, the law had two sections. In the latter, Sec. 1 repealed the law which authorized suit for a penalty, and Sec. 2 declared that "no penalty provided in said act shall hereafter be recoverable." In the former, Sec. 1 declared that "no right of way * * * shall be taken by any condemnation proceeding," and Sec. 2 repealed the old law. There is no distinction in language between the two, save that, in the penalty case, the law says, "no penalty shall hereafter be recoverable," while in the condemnation case, it says, "no right of way shall be taken." If any distinction thereby results, the use of the word "hereafter" would tend to show an intent not to apply to existing suits; but the Kentucky court held even that language to apply to such suits. Even if the questions of constitutional power and of applying Sec. 465 were otherwise doubtful, we would be compelled to think them foreclosed for us by the decision in the Pannell case. We may add that the "right" of the person injured, by a warehouse overcharge, to carry his pending suit to judgment and to collect the prescribed penalty is plainly not of less degree or dignity than the "right" of a telegraph company to pursue to the end its pending condemnation where the result will be only to give the company an option to take the property or abandon it. It cannot be that the former right may be destroyed by the legislature, while the latter is inviolable.

Our conclusion is confirmed, when we remember that a license not coupled with an interest is revocable until executed, and when we compare the license granted by the condemnation act of 1898 with a private license. If we may suppose that A, owning land, had granted a revocable license to B for a right of way thereover in order that B might reach the adjoining land of C, wherein B claimed certain rights, and litigation was pending between B and C wherein B's contention involved and rested upon this license, it could not be thought that the pendency of this suit between B and C would, of itself, prevent A from revoking the license, or that B's rights, which depended solely thereon, could survive the revocation.

Notice should be given to the case of Treacy v. Elizabethtown, 85

Ky., 270, upon which appellee relies. A special act provided for condemnation by a railroad. The prescribed proceeding was commenced by the railroad, an award of damages had, and the amount of the award paid into court. The property owner appealed and secured a reversal because the railroad had not proved the necessity of taking for public use. Pending this appeal, the legislature repealed the special act and substituted a more general law, differing in important particulars. A new trial was conducted under the repealed, special act, and from the resulting judgment, the property owner again appealed, thus presenting the matter decided by the opinion just cited. For reasons which are not now important, the court reached the conclusion that if, under the special act, the railroad had proved the necessity for taking and an award had been made and it had paid or tendered the amount of the award, it would thereby have acquired a vested and perfect right to enter upon and use the property,—a right so unconditional that it could not have been affected by any subsequent reversal and a new trial on the subject of damages. (5) Upon the basis of this conclusion, the court holds that since the railroad company had thus acquired this kind and degree of a right before the repeal of the special statute, it was error to continue proceedings thereunder. Since, in the present case and under the condemnation law of 1898, it is clear that the Telegraph Company had not acquired any vested right when the repealing act was passed, and that the reversal of the judgment (unlike the reversal contemplated by the special act in the Treacy case) had retrospective effect to destroy the basis of any such right, the decision in the Treacy case supports the present contention of the Railroad Company. If such right as is acquired merely by commencing a condemnation suit, were sufficient to invoke the saving action of Sec. 465, or to invoke the supposed Kentucky rule that legislation may not change the status of parties in a pending litigation, the decision of the Treacy case must have been the other way. It could not be of controlling importance in the case that a new law was substituted for the one repealed, while, in the present case, there was no such substitution. The question was whether the old law did or did not continue in force for the pending case.

We may add that further consideration of the case of *Marion* (Louisville, etc., *supra*), seems to lead us inevitably to the conclusion that we are adopting. It was there held that the railroad company prosecuting condemnation, could abandon the proceedings at any time, because it was merely exercising authority delegated by the state, and it should have the same right to abandon which the state concededly had. The statute of 1916 was only a method of directing the abandonment of all proceedings pending under the 1898 statute. The *Marion* case can be distinguished only by saying that the agent may abandon but the principal may not.

(5) The court is apparently quoting from or paraphrasing the special act, when the opinion says:

"Immediately after the return of the first verdict, and whether the same was set aside and a new jury ordered or not, the appellee had the right to enter upon the land and construct its road; and upon payment or tender of payment of the amount assessed, the appellee was clothed with the actual title to the property."

294 The impression easily arises that repealing legislation of this kind, which affects pending suits, is obnoxious to principles of fairness, but that is a question for the legislature and not for the courts. Nor is it wholly one-sided. It appeared beyond dispute in the previous phases of this litigation that the erection and maintenance of such a telegraph line would necessarily cause some degree of annoyance and embarrassment in the operation of the railroad. It is not necessarily arbitrary and unreasonable for the legislature to think it will no longer lend its aid to one who is trying to locate such a line upon a railroad right of way against the will of the railroad, but will rather compel the Telegraph Company to buy its right of way from those who are willing to sell, or to use the roads and streets which the public owns.

We do not consider the matter foreclosed by our former mandate directing a new trial. The fact that the law of 1898 had been repealed did not then appear by the record in the case, and our mandate must be construed by the existing record.

Since the only matter involved is as to the construction and validity of the law, there is no question of a permissible discretion exercised by the court below in refusing to dissolve the preliminary injunction. The order must be reversed and the case remanded, with instructions to dissolve the injunction, as to Kentucky, as prayed.

A true copy.

Attest:

ARTHUR B. MUSSMAN,
*Clerk U. S. Circuit Court of
Appeals for the Sixth Circuit.*

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No. 3320.

United States Circuit Court of Appeals, Sixth Circuit.

LOUISVILLE & NASHVILLE RAILROAD Co., Appellant,

vs.

WESTERN UNION TELEGRAPH Co., Appellee.

On Application for Rehearing.

Dated October 15, 1920.

Before Knappen, Denison and Donahue, Circuit Judges.

Per Curiam: In an application for rehearing, the Telegraph Company insists that, by the law of Kentucky, when the jury in a

condemnation matter assesses the damages and the condemnor pay, or tenders the amount to the owner, the title vests and is unaffected by any subsequent reversal of the award on appeal; that the condemnor's election, after the first award to pay and take the property is irrevocable; and that where there are unknown or unreachable owners (as the mortgagees here), the statute may rightly provide (as this did) for payment into court in lieu of personal payment. It refers to several Kentucky decisions in railroad condemnations* which hold that the immediate possession and use of the property may be had by the condemnor upon payment of the assessed 296 damages, and that if upon the statutory appeal for de novo trial, the damages are increased, the owner's remedy is a personal judgment for the excess. We find nothing held in any of these decisions which necessarily reaches beyond a present and perhaps contingent possession, or which would deny the right of the owner to have possession returned to him if the damages, as finally fixed, were not paid,—a protection which seemingly would be necessary under the Kentucky Constitution,—or if the right to condemn should finally be denied. These decisions rest upon the peculiar nature of the railroad condemnation laws. In condemnation for railroad purposes, the right is not usually disputed, but the amount of damages is the thing contested. It is, therefore, not necessarily inappropriate that the right of possession should at least contingently pass, pending a judicial review of the award and on condition that the payment to be finally adjudged is properly secured (but see *Covington Co. v. Piel*, 87 Ky. 267). Perhaps upon this theory Sections 838 and 839 of the Kentucky Statutes provide for assessment by commissioners, a report to the Circuit Court, an order of confirmation, if there are no exceptions, and, if there are exceptions, a jury trial as to the amount of damages. The statute does not in terms contemplate any review of the judgment so rendered, but provides that the railroad, on payment of the judgment, may take possession of, use and control the property as fully as if the title had been conveyed. Some special charters upon which some of the cases depend expressly state that this possession may be maintained in spite of a new trial or further trial. It is in execution of a policy so declared that the conclusions of the Kentucky Court of Appeals, in the cases cited, have been reached; the right to condemn was not challenged nor was any question involved, excepting as to damages. On the contrary, in *Tracy v. Elizabethtown Co.*, 80 Ky. 259, it was recognized that the right to condemn 297 may be disputed in the same proceeding or in an injunction suit, and the discussion found in that opinion must, we think, lead to the conclusion that if the right should finally be denied, the possession taken by the railroad must be given up.

The telegraph condemnation act here involved contains no corresponding provisions; on the contrary, it, in effect, declares that

**Chicago Co. v. Sullivan*, 24 Ky. L. R. 800; *Hamilton v. Maysville Co.*, 84 S. W. 778; *Long Fork Co. v. Sizemore*, 184 Ky. 54; *Shirley v. Southern Co.*, 81 S. W. 268; *Madisonville Co. v. Ross*, 126 Ky. 138.

upon appeal there shall be supersedeas unless the condemnor gives a bond in double the amount (which was not done here). The statute expressly requires, as the first step, a judicial finding that certain conditions exist upon which the right to proceed further rests; an appeal from this finding, as well as from the award, is necessarily contemplated; it is not to be supposed that while it is still open for the courts to decide that the right does not exist, the title may nevertheless become irrevocably vested in the condemnor. Even if there were in this statute provisions more closely analogous to the railroad statute, we can not think that the Kentucky courts would consider the title to be transferred and vested by a payment into court, which payment the owner refused to accept and which was pursuant to a judgment later wholly vacated.

The application is denied; but our orders will be without prejudice to the right of the District Court to maintain the injunction for such brief period as may be necessary for the Telegraph Company, using care and diligence, to remove its property.

A true copy.

Attest:

ARTHUR B. MUSSMAN,
Clerk.

The foregoing Bill of Exceptions is hereby signed as a true Bill of Exceptions.

WALTER EVANS,
Judge.

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Opinion.

Circuit Court of Appeals, Sixth Circuit. April 2, 1918.

DENISON, *Circuit Judge*:

The facts which led up to the present controversy are sufficiently detailed in our opinion in Louisville, etc., R. R. v. Western Union Co., 207 Fed. 1, 124 C. C. A. 573. Following out the theory upon which the telegraph company was there held entitled to a restraining order, it instituted, in the court below, a condemnation proceeding against the railroad company, for the purpose of acquiring the right to maintain its line in the position it was already occupying upon and along the railway grounds. The line along the right of way thus sought to be condemned, and lying in Kentucky, was about 1,000 miles long. There having been a preliminary determination by the court that the necessary precedent conditions existed, there was a trial before a jury as to the amount of damages, which resulted in a directed verdict for \$5,000. Treating the whole proceeding as a trial at common law, the railroad company brings this writ of error. The assignments are ample to raise every existing question.

The disposition of many of the questions presented depends upon the construction and interpretation of the Kentucky statute (Acts

1898, c. 49; Ky. St. Sec. 4679c), the pertinent parts of which we reproduce in the margin. In that construction—so far as concerns most of the questions—we have no help from any decisions of the Kentucky Court of Appeals. The statute has been before the Kentucky court of last resort only twice, and then not upon matters of general construction. We therefore seek to ascertain the meaning, according to what seem to us the necessary inferences from the language used and from common knowledge of the situation involved, and from that viewpoint consider other decisions as far as they seem pertinent.

(1.) 2) 1. This statute gives the right of eminent domain. A necessity for taking ordinarily underlies the exercise of such right, and statutes sometimes direct how that necessity shall be determined. See *Lewis on Eminent Domain* (3d Ed.) Sec. 595-600. This statute contains no such direction, nor does it expressly require the judicial determination of any such general condition precedent. Clearly, however, there might be circumstances which would make the exercise of the right so unreasonable and arbitrary that we could hardly suppose the Legislature intended to permit it; and section 7 expressly contemplates that only so much shall be taken as is necessary. We think it safe to assume that some measure or degree of necessity must be shown or be presumed to exist before the right of condemnation matures. The telegraph company does not possess any fraction of the state's legislative power, and does not have power itself to declare a necessity, because a legislative body may do so. See *Sears v. Akron* (March 4, 1918) 246 U. S. 242, 38 Sup. Ct. 245, 62 L. Ed. —.

(3.) 2. Embodied in the first section, and so perhaps to be considered as a condition of the grant, are these words (selecting only those now important):

"Provided, that the posts, arms, insulators, and other fixtures of such telegraph lines, be erected and maintained in the usual manner of constructing, operating and maintaining telegraph lines on or along and upon the right of way of railroads * * * and in such manner as not to interfere with the ordinary use or the ordinary travel on such * * * railroads."

299 The telegraph line must be erected, operated, and maintained in the usual manner, and must not interfere with the ordinary use of, or traffic on, the railroad. We cannot regard this proviso as intending to formulate a hard and fast condition precedent which might prevent any condemnation, and this for three reasons: The first is that in the ordinary and typical case which the Legislature must have had in mind no such broad issue could arise. In almost any supposable situation (save in exceptional spots) a telegraph line could always be constructed and maintained in some suitable place along the railroad right of way, without constituting such an interference with the use of the property for railroad purposes as the Legislature could reasonably consider sufficient to prevent con-

demning at all. The second reason is that the provision as to maintenance cannot be a condition precedent to condemnation, and yet it is put precisely on a par with the condition as to construction, "be erected and maintained," and hence the provision as to the erection cannot be a general condition precedent. The third is that the language is not conditonal in form. It is not "provided that the * * * lines" can be erected, etc.; it is an affirmative requirement that, if built, they "be erected and maintained," etc.

In our judgment the rare instances—if there are any—where interference with railroad use will be so inevitable, so extensive and so serious as to forbid condemnation at all only present a phase of "necessity"; and this proviso is intended to describe and characterize the nature of the right and easement which are to be condemned. The right to erect the poles and wires is given, but they must be so put up at the beginning, and always so maintained, as not to constitute the forbidden interference with ordinary use. The provision expresses, not a condition precedent, but a condition constant—a continuing limitation.

(4) 3. It is no part of the condition or limitation that the telegraph line shall not interfere at all with railroad uses and purposes; such a thought would be contrary to common knowledge and observation. No telegraph lines can be erected and maintained on a railroad right of way without interfering in some measure or degree with some of the uses to which the railroad may rightfully wish to put the occupied property. To say that any such incomplete and partial interference was contemplated by the proviso as a condition or limitation precedent would be to defeat the whole object of the statute, by providing that the condemnation and use should not occur except under conditions that never exist. Nor does the literalness of the language require any such sweeping view. It speaks of interference with "ordinary" use or traffic; it makes no reference to the supplementary uses which are rightful and sometimes necessary.

In this connection, it must be observed that section 4, with reference to the oath of the jury, and section 5, regulating the evidence, expressly provide that the railroad shall have, not only the value of the land to be taken and occupied, but such damages as "will accrue to the defendant in the diminution of the value of the remainder of its right of way for railroad * * * purposes." It is plainly inconsistent with this damage-defining provision to suppose that there can be no condemnation unless it has first been determined that there will be no impairment of the use of the remainder of the property for railroad purposes. We think the conclusion inevitable that the statute, taking its various parts together, has reference to two kinds or degrees of interference with such use of the property, and that only when the interference is so inevitable and so extreme as to seriously hamper ordinary use and traffic on the railroad is it intended that the condemnation proceedings should be dismissed, in whole or in part, for that reason.

It is well recognized that this "interference" may be insufficient

to forbid condemnation and yet sufficient to justify damages. In *Louisville Co. v. Western Union Co.*, 184 Ind. 531, 534, 111 N. E. 802, 803, Ann. Cas. 1917C, 628, the Supreme Court of Indiana considered—

"when such interference passes the stage where it may be compensated in damages and becomes so substantial and material as to preclude the right of * * * appropriation."

In applying a generally similar statute, the Supreme Court of Tennessee, in *Western Union Co. v. Railroad Co.*, 133 Tenn. 69, 714, 182 S. W. 254, 260, said:

"We deem the true rule to be that property already dedicated to a public use is in this respect on the same plane as other property, provided there does not exist a condition that would prevent condemnation—an interference with the first public use by the second so material as to 'obstruct' or seriously and extraordinarily impair the use for ordinary railway purposes, including telegraphic communication by means of the railway's own line of wires.

"If the interference goes to the extent of so obstructing the earlier use, the power to condemn is lacking; but the theory underlying our statute is that when the interference does not go that far, the inconvenience and impairment may be compensated for in damages and the taking for the second use permitted."

(5) 4. The damages to be recovered are for the land actually taken and occupied, and for the diminution of the value of the remainder. In the ordinary sense of most condemnations, no land is here "actually taken and occupied"; but the language is adopted from the familiar situation where it is more accurate. The total area upon which the poles and guy wire posts stand is negligible—perhaps two acres for the thousand miles—and the strip of land overhung by the cross-arms and wires is not appropriated in any exclusive way. "Taking" doubtless there is of this pole-occupied area and of this strip, in the sense that compensation must be made pursuant to the constitutional mandate; but when we find that even this "taking" is not specifically permanent, but is subject to be shifted to other positions (as we hereafter point out), we are unable to see any substantial distinction, as to compensation basis, between the land "actually taken" and the diminution of the remainder. It is impossible to know the value of what is "taken" in this qualified sense, except by measuring that value in terms of damage to the remainder. In its entirety, there is disclosed only the imposition of a shifting easement (in gross) upon a servant estate, involving the exclusive and permanent appropriation of no substantial body of property, but only lessening the value of the servient estate to its owner; and a distinction, created *prima facie* by the statute, between the taking of the one and the diminution of the other, is an artificial and unsatisfactory basis for assessing compensation.

301 *Postal Co. v. Patton*, 153 Ky. 187, 154 S. W. 1073, is not inconsistent with this conclusion. The Kentucky Court of

Appeals had there a case where the facts permitted the full application of the statutory theory that there is a real taking of part of the property, and where, therefore, it was necessary to describe with certainty the property to be taken. That was the case of a telephone line constructed across farm lands, and the owner of the farm was deprived of his ordinary use of the entire width of the strip, which must be subject to travel and use for repair and maintenance. Upon this strip he could not safely plant crops in the ordinary way. The differences are obvious between that situation and one where the telegraph line is and continues to be subject to the right of the owner of the servant estate to use his property for its primary purpose. What is said in this paragraph is not intended necessarily to deny that the right or easement condemned may be part of the statutory "land actually taken and occupied" and may have an independent value because capable of sale or lease. The record does not prevent this question in any concrete way.

(6) 5. Considering, not only the language of the statute, but the familiar elements of the situation to which it referred, we must infer that there was no intent to give the telegraph company a permanent specific location, from which it could not be thereafter removed, except by a cross-condemnation proceeding—if at all. It was as well understood in 1898 as it is today that the necessary use of a railroad right of way for railroad purposes at any selected place was subject to constant development and increase. Changes of the road-bed in order to lessen the gradients always had been possible and were coming to be very common. They involve excavations and fills. Much of the Kentucky railroads is through rough and mountainous country, and vast amounts of such work must have been anticipated. Double-tracking upon trunk lines to meet increasing traffic was known to be necessary. It would often involve removing any telegraph line close to the previously existing single track. Much of Kentucky's railroad system consisted of trunk lines; and the Legislature could not have overlooked the obvious fact that the permanent maintenance of a telegraph line in any particular location upon a railroad right of way might forever bar the reasonably necessary excavation, regrading, double-tracking, signals, switch tracks, terminals, or other proper uses by the railroad of its own property; nor could the Legislature have intended that the telegraph company must pay the enormous damages which alone could rightly compensate the railroad company for the permanent deprivation of these rights. We then find written into this statute the specific direction that the line shall be "erected and maintained" in such a manner as not to interfere with the ordinary use of the property for railroad traffic. No exigency of construction requires us to think that the probable uses which we have just specified and other similar ones were not among the ordinary uses in contemplation of the Legislature. We think this statute was passed and its language chosen in view of the well-known situation, and that a reasonable construction of the statute requires it to be interpreted as providing that the right taken by the condemnation is one which must be exercised by original location where it will least interfere with railroad uses and which is burdened

by a future liability to move to other parts of the right of way, if such moving becomes reasonably necessary to avoid the forbidden interference. In saying this, and in referring elsewhere in this opinion to the burden of removal resting upon the telegraph company, we refer only to a removal to some other location within the limits of the right of way. Such apparent necessity as might develop for removal entirely outside of those limits—if such a case may be supposed—involves a contingency which we do not consider.

302 (7) Such a construction of the statute and the mutual rights and duties thereby created present no greater practical difficulties than are common in some other relationships. The standard of good faith is a simple one, and what the railway company would do if the telegraph line were its own is the measure of that standard. In such case, if the telegraph line were in the way of some desired use, the railway company would balance the trouble and expense of transferring the line against the reasons in favor of the transfer, and would decide accordingly. So, when the wire line belongs to the telegraph company and the railroad desires to use the space on or above the ground for other purposes. The reasonable convenience of both parties must be balanced; an arbitrary decision may not compel nor prevent a transfer. If there were otherwise difficulty about holding that telegraph company's location was subject to possible shifting rather than permanently fixed, that difficulty would be here removed, because neither party can complain of this conclusion. It favors the railroad company, and the telegraph company has, by its petition, consented. The objection is that these are promissory stipulations, which have no place

(8) 6. The railroad company objects to those provisions in the petition and in the judgment which provide for the future moving of the telegraph line to meet future railroad necessities, and its objection is that these are promissory stipulations, which have no place in the proceeding, and which cannot operate to reduce the damages to be awarded, because the performance of these stipulations will be, in a practical sense, largely at the will of the promisor. In the ordinary condemnation, where an exclusive possession is to be awarded to the condemnor, it may well be that such promissory stipulations cannot control the damages, and the same result has been reached even in the condemnation of a telegraph line over a railroad right of way. *Louisville Co. v. Western Union Co.* 184 Ind. 531, 111 N. E. 802, 803, Ann. Cas. 1917C, 628. However, we construe this statute as intending that the easement condemned shall be an easement subject to these limitations. It is not important that the telegraph company makes a promise to remove its line; when the event occurs which makes moving necessary, the right to maintain this line in the former location ceases; the judgment of the court formulating this limitation may, and in the public interest should, prescribe the method by which the reasonable right of the telegraph company to move its line in its own way and at its own expense may be preserved; but the controlling principle is that ultimately the right further to maintain the line in the first location expires and

the railroad company may remove it. From this point of view, it is clear that the objection of the railroad company against being subject to promissory stipulations must fail. In adopting this view, we concur with the Supreme Court of Tennessee in saying, as it did, in 133 Tenn. 691, at pages 706 and 707, 182 S. W. 254, 258:

"Under this construction the terms set out and acceded to by the petitioner are not to be considered contract terms. They are not party-imposed, or court-imposed, but law-imposed. Any subsequent shifting in the pole line is to be referred for basis to the statute's provision for the safeguarding of the railroad user. It does not and will not depend upon the volition of the condemnor. An easement for a telegraph line is to be condemned, subject to such non-contract provisions in favor of the railway. To guarantee the observance of such terms by the petitioner, the petitioner sets them forth and judgment goes in accord."

303 The same conclusion has been reached in other cases, though with more dependence upon the form of the petition than we should be inclined to approve. See *St. Louis Co. v. Postal Co.*, 173 Ill. 508, 535, 51 N. E. 382; *American Co. v. St. Louis Co.*, 202 Mo. 656, 101 S. W. 576.

(9-11) 7. The diminution in the value of the right of way for railroad purposes is to be assessed. It is clear to us that the use by a railroad of its right of way for constructing and maintaining its own telegraph, telephone and electrical signal lines, is use for a "railroad purpose"; indeed, we do not find, in the elaborate briefs of counsel for the telegraph company, any denial of this proposition. The railroad orders are transmitted by telegraph and by telephone, block and other distance signals are controlled through the use of electric currents passing over the wires, and, as matters were in 1898 and are now, a railroad can no more operate without a telegraph, telephone, and electric signal system than it can without tracks or cars. *Com. v. Louisville Co.*, 164 Ky. 818, 832, 176 S. W. 375; *Western Union Co. v. Nashville Co.*, 133 Tenn. 691, 718, 182 S. W. 254.

It necessarily follows that, for such interference as the condemnation causes to the use by the railroad company of its right of way for its own wire line, the condemnor must pay damages; and since any absolutely necessary use is an ordinary use, it also follows that the line condemned must be originally located where it will cause the minimum of interference with railroad use of the property for its own telegraph line.

This is the principle which seemingly must control such condemnation proceedings in cases where the railway company has selected its location and built its line and in cases where there is no telegraph line along the right of way, but the railway company is about to build. Under such circumstances there is strong support for the "preferential right" contended for by the railroad and upheld by the Georgia courts. *Western & Atlantic Co. v. Western Union Co.*, 138 Ga. 420, 427, 75 S. E. 471, 42 L. R. A. (N. S.) 225;

Louisville Co. v. Western Union Co., 142 Ga. 531, 83 S. E. 126. Nor do we think any difference in the result necessarily follows from the fact that the existing line was built by the telegraph company through arrangement with the railroad company for a joint use under a contract by which the railroad company, in substance leased the right of way to the telegraph company and the telegraph company paid its rent by telegraph service rendered. When such a contract expires by the election of the telegraph company (as here occurred), it is not easy to see why its rights, when it is driven to condemnation, are any greater because it formerly had a lease. See *Western, etc., Co. v. Western Union Co.*, 138 Ga. 420, 73 S. E. 471, 42 L. R. A. (N. S.) 225. In this case, when its line was built, there was no statute for condemnation, and the line must have been erected under the expectation that at the expiration of the lease the telegraph company, failing in a new contract, would get off. While these appear to be the applicable principles, we do not need to pass upon them in any absolute way. A peculiar condition has here arisen, and it must be met according to the facts as they are. In the years which have passed since this controversy arose, the railroad company has built its own line for a great part of the Kentucky distance now involved—perhaps now the greater part of the more important lines. This line is complete and performs all the service needed by the railroad in its railroad operations. It consists of a line of poles and wires, erected usually upon the

304 opposite side of the right of way from that occupied by the telegraph company's line, but in places erected on the same side, but on higher poles. To require now that the telegraph company should remove its line from its present location, in order that the railroad company might occupy that same location, would be doing a great injury to one party without any compensating advantage to the other. It is not to be supposed that the railway company desires now to take down its own line, recently erected at great cost, and move it to the location occupied by the telegraph company's line; indeed, we do not find the railroad company claiming any intention of doing so, generally, if the condemnation could be entirely defeated. It is true the railroad company has not erected this line voluntarily, but has been compelled to do so because the telegraph company, through the aid of the courts, has maintained its possession of the preferred line, and hence, the conclusion that the railroad company cannot exercise its theoretical preferential right cannot be based on any election by it; but we think it has sufficient basis in the fact that no other outcome is now practically possible, save to allow the parties to keep their respective locations and compensate the railroad company in damages for the additional expense, past and future, thus caused. Neither party can complain of this conclusion: the railroad company because the alternative—that it may evict the telegraph company from the right of way which the railroad company does not need—cannot be accepted; the telegraph company, because it has selected this preferred location, always insisted upon it, and practically evicted the railroad company therefrom.

(12) 8. The telegraph company urges that the railroad company is entitled only to nominal damages, and hence that questions of evidence on the subject of damages are immaterial. In a case where it is thought that the telegraph company's easement is ambulatory or shifting, and constantly subject to the changing needs of the railroad, and where the telegraph line is to be erected at the edge of the right of way, a pole length away from the track, and not interfering with any present or prospective telegraph line of the railroad company, there is room to contend that nominal damages are sufficient. This result has been reached in several cases more or less dependent upon the conditions just stated. These cases are collected and sufficiently considered by Judge Sanborn, speaking for the Circuit Court of Appeals of the Eighth Circuit, in *Northern Pacific Co. v. North American Co.*, 230 Fed. 347, 354, 144 C. C. A. 489, L. R. A. 1916E, 572; and, without intending to pass upon rental value as a measure appropriate to this case, we do not hesitate to apply Judge Sanborn's general conclusion to a case like this, and to hold that the nature of the railroad's property and the character of the easement condemned require substantial, rather than nominal, damages.

Even if the present case indicated nothing more than nominal damages as to the interest "actually taken," so far as that interest can be separately conceived, yet it is one for substantial damages with reference to the diminution of the value of the right of way for railroad purposes. This conclusion would result from the element of conflict with the plaintiff's telegraph line, even if there were no other element of damages, but also from the other elements we hereafter indicate. The evidence strongly tends to show that the location which the telegraph company insists upon occupying and which must be conceded to it under existing circumstances is the natural and best one for the railroad company's line, and that the construction of the latter in other places makes it not only less convenient of use but much more expensive to build and maintain.

305 (13) 9. Our conclusion that the telegraph company's location is not to be in all respects fixed and permanent affects much of the damage claimed on the trial; but after the revision necessarily following this conclusion, we think the testimony given or offered tended to show that damages to the railroad—that is to say, a lessening of the value of the right of way for railroad purposes—will arise from the following sources:

(a) The necessary use of the railroad company for the maintenance, changing, and repair of the telegraph line. In the adoption of the *Patton Case* (telephone) into the telegraph company law made by *Louisville Co. v. Lang*, 160 Ky. 702, 706, 170 S. W. 2, it is perhaps implied that the particular strip needed for access for repairs should be specified. We cannot take this implication as intended to decide the point. It fails to observe the difference between farm lands and a railroad right of way. It would be manifestly impracticable for telegraph company employes to travel or for new poles to be carried along any particular strip away from the

track. Practically, these employees must use the railroad track or any part of the railroad right of way that may happen to be necessary. Indeed, there are some miles of this pole line which cannot be reached at all except from the track.

(b) The troubles and delays resulting from the necessary opportunity to be given the telegraph company to move its line when the existing location is sufficiently needed for trackage or structures, excavations or fills, unobstructed vision, or any railroad use, and from collecting the expense of making such removal from the telegraph company if the railroad does the moving itself.

(c) The additional expense, past or future, resultant upon the erection and maintenance and operation of the railroad's telegraph or signal line upon a location less desirable than that which would have been used except for the telegraph company's line. It can make no difference with this additional expense whether or not the railroad company intends to, or has the right to, carry commercial wires upon the same pole line and do a commercial business.

(d) The impairment of the most perfect utility to the railroad of its right of way and tracks in those particulars not sufficiently vital to justify the removal of the telegraph company's line to another location. For example, poles or guys or braces are said to embarrass operations of spreaders, wreckers, pile drivers, steam shovels, blasting work, etc. The fact that the railroad company has acquiesced in this situation for a period of years or desired the same location for its own line is sufficient to show the lack of that obstruction which would be fatal to condemnation; but it is not sufficient to prevent the railroad from claiming damages—if any there are—for these or similar burdens after it has lost that joint interest in the telegraph line which may have compensated for the acquiescence, or when it is not to have the benefit which might counterbalance the burden.

(e) Additional expense caused by the presence of this additional telegraph line in the matter of keeping the right of way free from weeds and refuse. This duty was imposed by statute (Kentucky Statutes, Sec. 790), but a similar right, if not duty, would exist without statute (*Postal Co. v. No. Pacific Co.*, (C. C. A. 9) 211 Fed. 824, 827, 128 C. C. A. 350). Clearly, any method of keeping the right of way clear is likely to be somewhat more expensive, if there is standing upon it a line of poles to be taken into account. One of

these methods is by fire, and the telegraph company offers to
306 release the railroad company from any claim for injury to the poles by fire; but, in spite of such release, the railroad company must, for its own protection against the falling of poles upon its track, exercise great care to prevent the burning of a pole, and, as it would be liable only for negligence, this release does not seem important in the present computation of damages.

(f) Other additional expense of maintenance of way and structures and keeping track open. It is said that poles and wires obstruct ditch cleaning, that poles on a slope cause slides and washouts,

that old ties and refuse cannot be so conveniently burned, and that fallen wires and fallen poles must be guarded against and removed.

(9) Any element of danger added to the railroad operations. This diminishes the value of the right of way for railroad purposes. If it is to be reasonably anticipated that poles may fall across the track, that telegraph wires may fall upon signal wires, and interrupt signals, or that the line of poles and cross-arms, particularly on a curve, may interrupt the engineer's view of signals—all these under conditions which have not called for the removal of the telegraph company's poles and wires to positions of entire safety—this indicates a diminution in value for which the railroad should be compensated.

It is true that many of these elements touch upon the speculative, and yet they constitute the very considerations which the parties would rightfully take into account in negotiating a sale or lease or considering the offer which must precede condemnation; the payment of compensation cannot be postponed until the contingency happens, and the amount must be fixed now by the use of that sound judgment in estimating uncertainties which juries are commonly called upon to exercise.

(14) While it is necessary that both the witnesses and the jury should understand the facts in regard to these separate items and other similar ones, if other—there are, upon which they may base opinions and verdict, yet, of course, the final question is as to the entire damages to be awarded as a unit. It may happen, as the record here suggests, that when elements of damage are taken separately and each considered by itself and fixed at an amount which the proof tends to support considering that element alone, yet that the sum total of all the amounts so reached will be so large as to be plainly unreasonable; and the jury may well be cautioned that it should take proof or estimates of the specific elements of damage only as an aid in solving the general question how much the value of the railroad right of way as a whole is injured by the erection and maintenance of the telegraph line as a whole.

(15) 10. While it has often been held that the measure of damages, where an easement is condemned, is the difference between the value of the servient estate before and the value after the imposition of the easement, yet this is only a convenient formula. When it is applied to a case of fee title of property subject to sale, it is clear and simple; not so when applied to a railroad right of way which was not held for sale, and which had no market value either before or after condemnation. In such a case, the total of the acreage values of the railroad right of way will only be confusing. The important question is how much the condemned easement damages the right of way for use for all appropriate railroad purposes. No one can be more competent to testify on this subject than railroad men familiar with the cost and effect of every operation which is or may be involved. In the end, much of their testimony will be matter of opinion, but it is of the typical character where opinion evidence must be received because it is best. It is not necessary that

they know the value of the land, because this is not substantially involved; nor is it necessary that they *show* know former sales of similar rights, for perhaps there never have been any, and, if there have been, each sale was a matter of bargain depending on its own peculiar circumstances. Of course, telegraph men, familiar with actual construction and maintenance problems, would be competent witnesses, as far as their knowledge extended. For instructive application of these principles to conditions analogous to those now involved, see *Sanitary District v. Pittsburgh Co.*, 216 Ill. 575, 583, 75 N. E. 248; *Cochrane v. Com.*, 175 Mass. 299, 302, 56 N. E. 610, 78 Am. St. Rep. 491; *Consolidated Co. v. Baltimore*, 105 Md. 43, 54, 65 Atl. 628, 121 Am. St. Rep. 553.

(16) 11. The Kentucky statute, upon which the proceeding was based is said to be unconstitutional for three reasons, viz.: (1) That a view of the premises was not permitted, whereby the owner was arbitrarily deprived of the best evidence of value; (2) that the title of the statute does not sufficiently express its subject, and (3) that it contemplates a final condemnation without notice to mortgagees. These three grounds are thought not to be covered by anything held by this court in *Louisville Co. v. Western Union Co.*, supra, or by the Kentucky Court of Appeals in *Louisville Co. v. Lang*, 160 Ky. 702, 170 S. W. 2, in each of which decisions the statute was upheld against the contentions there urged. Regardless of whether the question of constitutionality is not *res judicata* between these parties, we are not impressed that these new objections are insuperable. The statute says "the jury shall not be required to go upon or view such right of way." Considering the very common practice in condemnation proceedings, as well as in all judicial controversies involving the value or condition of property, whereby the trier of fact is permitted, in the discretion — the court, to see the property (a practice recognized by other Kentucky condemnation statutes), this provision should not be construed as depriving the court of all discretion to permit such view. Both its letter and its spirit are satisfied by holding that it intended that inspection and view of the premises should not be an essential prerequisite to a verdict. The Legislature hardly deliberated on the nice distinction—if there is any—between saying that the jury should not be required to view and saying that a view should not be required, and, with the latter form of words, "required" would naturally be taken as synonymous with "necessary." In many cases, a view of the property would be difficult, confusing, and not helpful; in many cases, it would be far the best possible evidence. The discretionary power of the trial court to permit or to refuse according to the nature of the case ought not to be destroyed, unless by the plainest language; and, to say the least, this language is not plain.

(17) As to the lack of sufficient title for the act, it is enough to say that the title is broad enough to include all provisions of the act and that the failure of the title to indicate the means to be employed is not a defect so clearly fatal that we would be justified in over-

turning, on that ground, a statute which has been recognized and enforced by the Kentucky Court of Appeals.

(18) No mortgagee is complaining of lack of notice. If the telegraph chooses to condemn and pay the award, and take the chance that it is not cutting off a prior right which may ripen into title through foreclosure, we do not see that the mortgagor is concerned in the constitutionality of the statute which expressly sanctions that practice. The Supreme Court has repeatedly refused to hear complaints about the constitutionality of a law, except from those who are hurt. *Red River Bank v. Craig*, 181 U. S. 548, 558, 21 Sup. Ct. 703, 45 L. Ed. 994; *Jeffrey Co. v. Blagg*, 235 U. S. 571, 576, 35 Sup. Ct. 167, 59 L. Ed. 364.

(19) 12. The court below had a preliminary trial, in the absence of the jury, in which it heard evidence and determined that there was necessity for the condemnation, and that the telegraph line, as proposed, would not interfere with the ordinary use of the railroad. The railroad company insists that, although trial by jury is not inherently necessary in condemnation cases, yet, under the Kentucky procedure, the form of common-law trial rather than of an extra judicial award has been adopted, and hence that the case is one where, by the federal Constitution and statutes, the trial must be by a jury. It is further insisted that the issues cannot be divided up, and part of them excluded from the jury trial.

We do not find it necessary to decide the question which the railroad company presents, so far as concerns the broad issues of necessity and of the forbidden, general interference. The undisputed facts here lead to the inevitable inference that whatever precedent general necessity the law contemplates was present, and that there would not be any such universal, necessary, and serious interference as would broadly forbid condemnation generally. *St. Louis v. Southwestern Co.* (C. C. A. 8) 121 Fed. 276, 285, 286, 58 C. C. A. 198. Upon these issues it would have been the duty of the court to instruct the jury to find for the telegraph company, and so it is quite immaterial whether the railroad company was entitled to a jury trial upon them.

(20) However, we infer from the record (the specific question has not been argued) that there are comparatively small fractions of the desired right of way as to which it may be reasonably claimed that the interference with the railroad use is too serious to permit condemnation. For illustration, there may be bridges or tunnels or other structures or short sections of the right of way already so fully occupied that there is no room for another telegraph line in addition to that to which the railroad is entitled for its own use—that is to say, where another line cannot be so placed that it will not substantially obstruct the use by the railroad of its right of way for some railroad purpose. It is not important to examine the details of the present record in this respect. Before another trial is had, conditions may have changed; and in view of the constant probability of such changes and the shifting character which we have ascribed to the easement to be condemned, the judgment finally entered will

necessarily speak as of its date in fixing the specific location of the line of telegraph poles and in adjudging that particular location to be requisite; and a change in location thereafter could be demanded by the railroad only because of conditions later arising. Hence it appears that, upon the new trial, disputable questions of necessity—i. e., the *frobidden* degree of interference—may be found to exist as to specific locations here and there upon the line, regardless of whether the controlling conditions existed at the former trial or have arisen since. If the railroad company's telegraph line at these spots can be built—or, if already built, can be operated—with reasonable safety and without prohibitive expense, then an award of damages will meet the case; if not, these particular locations should be exempted from the condemnation. The judgment to be entered must also recognize the necessary change of location in all instances that have developed up to that time, where, under the principles which we have announced, the railroad had become entitled to require such change.

It is thus apparent that some aspects of the question, whether there must be a jury trial as to necessity for condemnation, or as to the existence of an obstruction to, or interference with, the railroad not rightly to be compensated in damages, are not eliminated, but remain to be decided, in spite of the fact that the effect of the decision will be applicable specifically, and not generally.

It is thus apparent that some aspects of the question, whether there must be a jury trial as to necessity for condemnation, or as to the existence of an obstruction to, or interference with, the railroad not rightly to be compensated in damages, are not eliminated, but remain to be decided, in spite of the fact that the effect of the decision will be applicable specifically, and not generally.

It has been expressly held that the right of jury trial secured by the Constitution does not necessarily extend to condemnation proceedings, which need not be in the nature of suits at common law (*Bauman v. Ross*, 167 U. S. 548, 593, 17 Sup. Ct. 966, 42 L. Ed. 270); but it is also held that, when the condemnation proceeding is put into the shape of a suit at law calling for the action of a court, it must be treated as a case which is removable (*Madisonville Co. v. St. Bernard Co.*, 196 U. S. 239, 246, 25 Sup. Ct. 251, 49 L. Ed. 462), and as a suit at law in which the right to a jury to assess the damages or compensation is declared by R. S. Sec. 566, U. S. Comp. St. 1916, Sec. 1583 (*Chappell v. U. S.*, 160 U. S. 499, 513, 16 Sup. Ct. 397, 40 L. Ed. 510). On the other hand, it is the approved practice, both in Kentucky (*Warden v. Madisonville Co.*, 125 Ky. 649, 101 S. W. 914) and generally (*American Co. v. St. Louis Co.*, 202 Mo. 656, 101 S. W. 576; *Western Union Co. v. Louisville Co.*, 270 Ill. 399, 110 N. E. 583, Ann. Cas. 1917B 670; *Western Union Co. v. Louisville Co.*, 183 Ind. 258, 108 N. E. 951; *Western Union Co. v. Nashville Co.*, 133 Tenn. 691, 182 S. W. 254; *St. Louis Co. v. Southwestern Co.*, *supra*, 121 Fed. at page 285, 58 C. C. A. at page 207), unless the statute otherwise directs (e. g., section 8254, Mich. C. L. of 1915), that the question of necessity and similar precedent conditions should be decided by the court in advance of or separately from the jury trial concerning compensation. The Ken-

tucky statute now involved plainly contemplates the practice, for the prescribed forms of oath and verdict relate to compensation only (see sections 4 and 6, *supra*); and even in *Cahppell v. U. S.*, the trial court had determined the necessity before it summoned the jury (see 160 U. S. 502, 16 Sup. Ct. 398 (40 L. Ed. 510)), and this action was not questioned.

We conclude that it is carrying the analogy too far to say that, because a condemnation proceeding is a suit at law within R. S. Sec. 566 (C. S. Sec. 1583), for some purposes, all parts of it must be so considered for all purposes. When we depart from the common-law forms and practice, there may be very distinct issues of fact in the same case, some of which are historically—and seem rightly—proper to be heard by jury and others of which are not. Finding the amount of compensation is another term for assessing damages, and this always has been a recognized function of a jury. The determination of whether there are instances of exception to the general necessity for condemnation in this case, and the exclusion of such fractions of the line, if there are any, from the general condemnation, require a flexibility of judgment and an adjustment of alternatives not peculiarly within the function of a jury as that function is fixed either by theory or by precedent. They approxi-

mate at least as closely, and perhaps more nearly, the customary powers of a court of equity. Considering the general—and so far as we know the invariable—practice (where not controlled by specific statute) that these precedent questions should be determined by the court separately from the assessment of damages and observing the lack of any authoritative decision to the contrary in the federal courts, we conclude that whatever trial is to be had concerning these specific locations should be—as it was on the trial under review—to the court and not to the jury.

The subject of compensation for the use of the rights now condemned and during the interval since the contract expired and the injunction was issued is not overlooked; but it is not distinctly presented by this record. We assume that it may hereafter arise in some form.

The proceedings upon the trial may be said to have been generally in accordance with the conclusions we have expressed; but it was otherwise in some vital particulars, and the finding of the court, the verdict of the jury and the judgment entered thereon must be set aside, and the case remanded for new trial upon the question of amount of compensation, and for such further hearing and decision upon the question of the forbidden interference in specific places as we have indicated may be open.

KNAPPEN, *Circuit Judge*:

I concur, but with the qualification that I am not to be understood as recognizing that the telegraph company, after recovery in the condemnation proceeding and payment of compensation, is subject to liability of being ousted by the railroad company from the right of way, in whole or in part.

Assignment of Errors.

Filed April 15, 1916 (R., 196).

The defendant, Louisville & Nashville Railroad Company, states the judgment entered herein February 16, 1916, is erroneous, for the reasons herein set forth, which are hereby assigned as errors of the court. These errors are classified into three general divisions, to-wit:

I. The errors occurring prior to the trial of the questions submitted to the court alone, without a jury, in January, 1916.

II. The errors occurring at and during the said trial by the court alone, without a jury, resulting in certain findings of facts, entered January 29, 1916.

III. The errors occurring at and during the trial by the court, with a jury, in February, 1916, resulting in the entry of the judgment aforesaid.

I.

The Court, prior to the trial of the questions submitted to the court alone, without a jury, in January, 1916, erred as follows:

1. In overruling by the order entered October 24, 1912, defendant's special demurrer to plaintiff's petition, thereby holding the court had jurisdiction of the subject of this action and to grant the relief sought therein. (R., 24, 25, 26.)

2. In overruling by the same order defendant's general demurrer to plaintiff's petition. (R., 25, 26.)

3. In overruling by the same order defendant's general demurrer to plaintiff's petition, when the same should have been sustained, because the petition shows on its face and by its averments the plaintiff seeks thereby to impose certain unaccepted promissory stipulations and proposed agreements by the plaintiff in respect to undertakings to be performed upon contingencies subsequent to the time of condemnation or expropriation; and the petition further shows that it is not the purpose of the plaintiff to condemn for its use the land and rights described therein at all events and pay the compensation awarded therefor, but it is plaintiff's purpose to make the appropriation sought only upon the conditions stated in its petition, and in case it is permitted to impose such stipulations as to the future, and to have the same considered in the making of the award for compensation, and the petition must be construed as proceeding on the theory that the alleged right to condemn is to be exercised
312 on the terms, conditions and stipulations therein stated or not at all.

The unaccepted promissory stipulations referred to, as alleged in the petition, being in substance as follows:

That in the event defendant shall at any time desire to change the location of its tracks or to construct new tracks or to construct new depots or other buildings, or to change the location of same, where any of plaintiff's poles or wires are located upon defendant's right of way, the plaintiff consents and agrees to remove its said poles and wires at said points to any other part of defendant's right of way adjacent thereto, designated by the defendant, upon due and reasonable notice in writing to that effect, and at the expense of plaintiff. (R., 25, 26.)

4. In sustaining by the order entered December 17, 1912, plaintiff's demurrer to the 12th paragraph of defendant's answer as a whole and to sub-paragraphs Nos. 4, 5, 6, 7, 8 and 9 thereof. (R., 88-90, 102, 104, 105.)

5. In sustaining by the same order plaintiff's demurrer to the 14th paragraph of defendant's answer. (R., 88-90, 103-105.)

6. In sustaining by the same order plaintiff's demurrer to the 15th paragraph of defendant's answer. (R., 88-90, 103-105.)

7. In sustaining by the same order plaintiff's demurrer to the 17th paragraph of defendant's answer. (R., 88-90, 104-105.)

8. In sustaining by the same order plaintiff's demurrer to the 18th paragraph of defendant's answer. (R., 88-90, 104-105.)

9. In sustaining by the same order plaintiff's demurrer to the 19th paragraph of defendant's answer. (R., 88-90, 104-105.)

10. In sustaining by the same order plaintiff's demurrer to the 20th paragraph of defendant's answer. (R., 88-90, 104-105.)

11. In sustaining by the same order plaintiff's demurrer to the 21st paragraph of defendant's answer. (R., 88-90, 104-105.)

12. In sustaining by the same order plaintiff's demurrer to the 22d paragraph of defendant's answer, in which defendant sets up the amounts of the mortgage liens of record existing on the several railroads and property described in the petition, and the names of the several mortgagees, none of whom is made a party defendant, and all of whom are directly and materially interested and claim an interest in the subject-matter and controversy adverse to the plaintiff and are necessary parties to a complete determination of the questions involved in this action; and there is a defect of parties defendant to this action which defect is not shown to exist by the petition; and in holding that so much of the Act of March 19, 1898, as declares "that no notice of the condemnation proceedings herein provided for shall be given to any mortgagee of the defendant," is not null and void, on the ground that it contravenes the due process clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States and the Constitution of the State of Kentucky, which defendant in said paragraph of its answer pleaded and relied on. (R., 88-90, 104-105.)

13. In sustaining by the order of January 27, 1913, plaintiff's demurrer to the first paragraph of defendant's amended answer filed December 28, 1912, in which defendant sets up the action of defendant's board of directors on November 14, 1912, authorizing and directing its President to construct on and along defendant's rights of way telephone lines on its entire system, and automatic block signal lines on all main line divisions, and ratifying and approving the location made and selected by the engineering department of the defendant therefor prior to the bringing of this suit, substantially at the same place and on the same location on defendant's rights of way where the present telegraph line of the plaintiff is located. (R., 121, 122-124, 125-126.)

14. In entering December 20, 1915, on plaintiff's motion made December 15, 1915, an order that the court alone, without a jury, would hear such evidence as the parties might desire to introduce upon the question of the necessity of the taking by the plaintiff of the easement sought by it herein to be appropriated to its use as described in the petition as amended. (R., 162-163, 166-167.)

15. In entering at the same time, on plaintiff's motion made December 15, 1915, an order that the court alone, without a jury, would also hear such evidence as the parties might desire to introduce upon the question whether such appropriation upon the location sought, and the erection, operation, and maintenance in the usual manner of constructing, operating, and maintaining telegraph lines on or along or upon the right of way of the defendant, in the manner and upon the location prayed for in the petition as amended, will interfere with the ordinary use by the defendant of its right of way or with the ordinary travel and traffic on the railroad of the defendant. (R., 167.)

314 16. In hearing and determining alone, without a jury, the question stated in Error No. 14 hereof, and in thus depriving the defendant of a hearing and trial by a jury thereon. (R., 167.)

17. In hearing and determining alone, without a jury, the question stated in Error No. 15 hereof, and in thus depriving the defendant of a hearing and trial by a jury thereon. (R., 167.)

18. In overruling the motion of the defendant entered January 19, 1916, to require the plaintiff to make its petition more definite and certain in respect to the description of the property sought to be condemned as set forth in said motion. (R., 170, 196.)

19. In overruling the motion of the defendant to file its amended answer tendered January 20, 1916. (R., 171-174, 196.)

II.

The court erred in the following particulars in the trial by the court without a jury, begun on January 19, 1916:

20. In sustaining plaintiff's objection to the question propounded to the witness Terhune as to whether or not the Western Union Telegraph Company, if it desired to do so, could acquire rights of way over all the county or public roads in Kentucky and thus keep off the railroad's lines altogether, which question the witness would have answered in the affirmative, if he had been permitted to testify. (R., 207.)

21. In overruling defendant's objection to the testimony of the witness Irvine Hall and in permitting him to testify that the maintenance of the Western Union telegraph line along the Louisville & Nashville Railroad in Kentucky would not interfere with the ordinary use or the ordinary travel and traffic on the railroad and in holding that the witness was qualified to testify on that subject; said witness' testimony having shown that he had had no experience in or familiarity with railroad operations and that he was simply a telegraph man. (R., 211-212.)

22. In overruling defendant's objections to the testimony of the witnesses Granaghan, Winn, Miller and Ryder, and in permitting each of them to testify that the maintenance of the Western Union telegraph lines along the Louisville & Nashville Railroad in Kentucky would not interfere with the ordinary use or the ordinary travel and traffic on the railroad, and in holding that each of those witnesses was qualified to testify on that subject; each of them having shown by his testimony that he had had no familiarity with and and no experience in railroad operations, but was simply a telegraph man familiar with telegraph operations. (R., 213-214, 222, 224-225, 226.)

23. In overruling defendant's motion to dismiss the condemnation proceeding on the ground that the proof failed to sustain either the necessity for the taking of the property sought to be taken, or the fact that the lines of the plaintiff would not interfere with the ordinary use or the ordinary travel and traffic on defendant's railroad, and in permitting plaintiff to introduce additional testimony, to-wit, the testimony of J. R. Terhune and W. W. Ryder, and permitting them to testify that in their judgment it was necessary for the plaintiff to condemn the property sought herein to be condemned, after plaintiff had announced in open court that it had completed its testimony, and had nothing further to offer. (R., 230-233.)

24. In again overruling defendant's motion to dismiss the proceeding on the ground just above mentioned, which motion was renewed after the additional testimony of said witnesses Terhune and Ryder had been introduced. (R., 235.)

25. In sustaining the motion of plaintiff to exclude and strike out, and in excluding and striking out, all the testimony of defendant's witness Vincent E. Furnas, the substance of whose testimony, after showing that he is an electrical engineer of long experience, and of much experience in the construction of telegraph and telephone lines, was that he had made an examination in April, 1914,

of the rights of way sought herein to be condemned, his inspection being with certain named officials of the defendant company, with a view of determining the extra cost that the defendant would be required to pay in order to build its lines on the opposite side of the right of way from plaintiff's lines; and where it was impossible to do this, then to overbuild plaintiff's lines; that they made notes of the various details of facts bearing upon the matter of their investigation, and made estimates accurately to the best of the witness' ability as to what the extra cost would be to the defendant to build its own telegraph and telephone lines by reason of the presence of plaintiff's telegraph line, over and above what such cost to defendant would be, if plaintiff's lines were not there; that in certain places

316 it was impracticable for defendant to build on the opposite side of the track from where plaintiff's line is located, and that in all such cases defendant would have to build on the same side with plaintiff's line; and that at those places where defendant's line could be made on the opposite side it would, in some cases, require greater expense to maintain the line, because of the roughness of the ground; and that the witness had made an estimate as to the additional cost of maintenance, as well as the additional original cost of construction by reason of the presence of plaintiff's line; that in all these matters he had used current costs and prices, with which he was familiar, and that the total result of his estimate was \$66,558.88 as the extra cost of overbuilding, and building on the opposite side from plaintiff's lines, and including the extra cost of maintenance, all made necessary by the existence of plaintiff's line, which extra cost of maintenance was reached by capitalizing the additional cost of maintenance, and amounted to \$26,432.37, which figure is included in the figure \$66,558.88; that the total length of the line where overbuilding would be necessary is 214.14 miles out of a total of the lines in controversy of 1062.2 (R., 305-314.)

26. In holding, as the court did hold, in excluding all of the witness Furnas' testimony, that nothing in his testimony showed that the telegraph line of plaintiff would constitute any obstruction or interference such as is contemplated by the Kentucky Statute under which this proceeding was had, with the defendant's use of its property sought to be condemned, although it was shown by said testimony that the existence of plaintiff's line would, to a large extent, interfere with the construction, maintenance and operation of defendant's telegraph, telephone or signal lines. (R., 311-314.)

27. In excluding, and in refusing to allow to be read in evidence officially published reports of the Interstate Commerce Commission to the Congress of the United States, or the parts thereof, in which said Commission reported to Congress in substance as follows. (R., 315-328.)

Report of 1910: The general increase in the volume of traffic has been accompanied by a corresponding increase in accidents, as might have been expected, as there has been no noticeable change in rail-

way operating methods. The use of the block system is being slowly extended and there is no doubt that in those classes of collisions which the block signal is designed to prevent there is a diminution from year to year, but there has been no large percentage of increase in block signals for several years. The lessons afforded by the acci-

317 dent records have been set forth theretofore by the Commission, and need only be referred to. The main thing needed, in the judgment of the Commission, is the extension of the use of the block system to prevent collision of trains. The "Block Signal and Train Control Board" in its report this year again calls attention to this need.

Report of "Block Signal and Train Control Board, embraced within Interstate Commerce Commission's Report aforesaid: This Board has endorsed the recommendation of the Commission to Congress that legislation should be enacted looking to the compulsory adoption of the block system, because the art of block signalling is well settled. At the present time only about 66 000 miles of railroad out of an approximate total of 240,000 miles in this country are operated in the block system, notwithstanding the superabundance of evidence that the system has added immeasurably to safety in railway transportation. The introduction of the block signal system will tend to reduce the collision record in a very decided measure. The Board believes so firmly in the advantages to be derived from the use of the block system that it again urges the recommendation of the Commission to Congress for compulsory legislation requiring its use as the step of foremost importance in promoting safety in railway operation.

Report of Commission of 1911: The Commission has heretofore given details of the appointment of its "Block Signal and Train Control Board," together with the reasons why it becomes necessary to employ such an agency to enable it to carry out the direction of Congress expressed in the joint resolution of June 30, 1906, directing the Commission to investigate and report upon the use of and necessity for block signal systems and appliances for the automatic control of railroad trains. And the following is a brief summary of the conclusions and recommendations of that Board, which has been working for three years, to-wit:

It renews the recommendation contained in all of its preceding reports for the compulsory use of the block system on all passenger railroads.

It concludes that automatic train stops if properly installed and maintained, will materially contribute to the safety of railway travel, and that the use of automatic train stops is urgently demanded. It is convinced that the principles of design and application of automatic train stops are such that the railroads, if required to
318 use them, would find little difficulty in procuring appliances of this kind which would meet their operating conditions.

The Commission recommends to Congress, among other things, the following:

"To provide additional safeguards in railroad transportation for the employes and the public: (a) By standardization of operating rules of all interstate carriers; (b) By requiring the adoption of steel cars, postal, baggage and passenger; (c) By amending the hours of service law, making clear the proviso in Section 3 of the Act; (d) By legislation requiring the use of the block signal system."

Report of the Commission of 1912: To prevent railroad collisions adequate measures must be taken, first, to reduce the chances of human error to a minimum, and, second, to neutralize the effects of such error when it occurs. The recommendations previously made by the Commission for legislation requiring the standardization of operating rules and the use of the block system were designated to reduce the probability of mistakes by employes, and those recommendations are once more presented for the consideration of the Congress. * * * The block system by no means insures immunity from collisions, but its adoption would reduce the chances of human error and when used in connection with a code of operating rules suggested would greatly increase the safety in railroad travel.

Other reports of the Interstate Commerce Commission offered in evidence were of similar character to those, the substance of which has been above stated.

28. In refusing to permit defendant's witness Fugina to testify that the practice of different railroads in the country in using electricity as motive power in the movement of trains is continually growing; that this motive power is used on a number of railroads in the United States today over long sections of the road, over which trains are operated by electricity as a motive power, and that if the Louisville & Nashville Railroad Company should adopt electricity as a motive power, it would require additional space upon its right of way for the erection of apparatus for that purpose. (R., 349.)

29. In sustaining plaintiff's objection, and refusing to allow the witness Fugina to testify to the facts with relation to an accident that happened on the Nashville, Chattanooga & St. Louis Railway,

by reason of the falling of a Western Union wire across the
319 railroad signal wire, which witness would have testified, if allowed to do so, in substance that in the State of Tennessee, on December 23, 1915, a collision occurred between a freight train and a passenger train, resulting in the death of twelve persons, and the destruction of a large amount of property, the cause of the accident being this: That the block signal at one end of a block on the road showed "clear," on account of which a freight conductor, conducting a freight train, entered the block and collided with the passenger train which was already in the block; that the electric signal apparatus of the Railroad Company, if allowed to operate without obstruction, would have shown that this block was closed and the signal arm would have been at the "danger" position, to wit, horizontal; but that a Western Union wire had come in contact with the railroad signal wire, thereby introducing a foreign current into the railroad signal wire and causing the arm of the signal ap-

paratus to raise to the position of "clear," when, but for this foreign current, it would have been at the horizontal position of danger, and on account of this fact a collision happened and the deaths resulted. (R., 362-364.)

30. In refusing to allow the witness Eugina to state how he learned the facts as to the accident last above mentioned. (R., 364.)

31. In allowing the witness A. G. Shaver to testify in rebuttal for plaintiff to the effect that there was no difficulty in the construction, maintenance and operation of automatic signal lines along a railroad which has upon it a telegraph line; said testimony being properly in chief and not in rebuttal. (R., 376.)

32. In refusing to allow the witness Hobbs to prove and read in evidence certain letters and telegrams which he had received from officers and employees of defendant company, which in substance stated facts either within the knowledge of the writer, or which had been reported to the writer, as to interferences with and obstructions of the operations of the railroad by telegraph poles or wires of plaintiff falling on or near the tracks of defendant. (R., 387-390.)

33. In finding and deciding that there is a necessity for the taking by plaintiff of the easement sought by it herein to be appropriated to plaintiff's use as described in its petition as amended. (R., 309, 391.)

34. In finding and deciding that such appropriation upon the location sought, and the erection, operation and maintenance in the usual manner of constructing, operating and maintaining
320 telegraph lines on or along or upon a right of way of defendant in the manner and upon the location prayed for in the plaintiff's petition as amended will not interfere with the ordinary use or the ordinary travel and traffic on defendant's railroad. (R., 390, 391.)

III.

The Court erred in the proceedings upon the trial begun February 8, 1916, before the court and jury as follows, to-wit:

35. In stopping counsel for defendant in his opening statement to the jury, and in refusing to permit counsel to say to the jury that the existence and maintenance of plaintiff's pole line would interfere with the operation by defendant of its property over which plaintiff herein seeks to condemn a right of way, and would thereby diminish the value of defendant's said property. (R., 442-446.)

36. In refusing to permit defendant's counsel to say to the jury that plaintiff terminated the previously existing contract between plaintiff and defendant for the use of defendant's right of way by plaintiff. (R., 446-447.)

37. In overruling defendant's motion to send the jury out upon the premises sought to be condemned, in order that the jury might view the same, and in refusing thus to send the jury. (R., 449-450.)

38. In holding that the witness Courtenay was not qualified to testify as to the value of the property of the defendant over which the plaintiff seeks to condemn a right of way, or as to the value of the property that will be taken and occupied by the plaintiff under its petition as amended in this case, although said Courtenay had testified in substance that he has been Chief Engineer of the Louisville & Nashville Railroad Company for eleven years; that he entered the employment of the Louisville, Cincinnati & Lexington Railroad Company in 1879, as a civil engineer, the property of that company having been subsequently purchased by defendant, Louisville & Nashville Railroad Company; that he entered the employment of the Louisville & Nashville Railroad Company in 1881, thirty-five years ago, and has continued with it ever since, and is thoroughly familiar with all of its properties in Kentucky; that he does not simply devise plans and superintend construction of railroads, or other improvements for defendant, but personally attends to the details of the cost of construction, and is thoroughly familiar with these details. And furthermore, in case of building

321 new lines, or increasing the track facilities on existing lines, wherever it has become necessary to acquire rights of way, this work of acquiring rights of way has come under his supervision; that the cost of such acquisition has been submitted to him and that he has in this way become familiar with the cost of acquiring rights of way, as well as the cost of making the improvements of the Railroad Company after additional rights of way have been acquired; and that he is thoroughly familiar with the value of the property of defendant in Kentucky, and thoroughly familiar also with defendant's methods of operation in conducting its railroad, and with the situation of plaintiff's telegraph lines as now existing, and as sought herein to be continued, and with the property which they now occupy and the manner in which they use defendant's right of way, upon which telegraph lines are located. (R., 486-492, 505-518.)

39. In holding that the witness Courtenay was not qualified to testify as to the damage or diminution in value of defendant's property involved herein for railroad purposes by reason of the construction and maintenance of plaintiff's telegraph line in the manner set out in the petition as amended; the said Courtenay having testified to his qualification, as explained in the next preceding assignment. (R. 476, 479-485.)

40. In rejecting the testimony of the defendant's witness Courtenay, that anything which makes the operation of railroad property more dangerous, without a corresponding benefit therefrom, diminishes the value of the property. (R., 458-472.)

41. In holding that all inquiries into the actual damages to accrue to defendant in the diminution of the value of its right of way for railroad purposes must be based upon the ascertained and adjudicated basis that the construction, maintenance, and operation of plaintiff's telegraph lines upon the right of way of defendant will not interfere with the ordinary use, travel, and traffic on defendant's railroad; that this adjudication, previously made by the court, necessarily excludes all inquiry into facts indicating such interference, and that all investigation of the question of incidental damages must proceed upon the hypothesis, and all questions involving it must be based upon the fact, that the court had found that there was no such interference. (Opinions, R., 460-470, 484-485, 488, 491, 471-479.)

42. In holding that any question as to damages to or diminution in value of defendant's property for railroad purposes 322 must be substantially in the following form, or at least based upon the hypothesis indicated in the following form of question prescribed by the court in a written opinion:

"After a full hearing, the court on January 29th last found and adjudged the fact to be that the appropriation of part of the defendant's right of way upon the location sought, and the erection, operation, and maintenance in the usual manner of constructing, operating, and maintaining telegraph lines on or along and upon the right of way of the defendant in the manner and upon the location prayed for in plaintiff's petition as amended, will not interfere with the ordinary use or travel or traffic on defendant's railroad. Now, assuming that to be true, what will be the extent of the diminution in value of said property for railroad purposes by reason of the erection, operation, and maintenance in the usual manner of constructing, operating and maintaining telegraph lines on or along and upon the right of way of defendant in the manner and upon the location prayed for in plaintiff's petition as amended." (R., 491.)

43. In rejecting the testimony of defendant's witness Courtenay, that the presence of the Western Union Telegraph Company's line of poles, wires, etc., on the rights of way of defendant, makes the use of those rights of way, and the operation of its property by defendant, more difficult, more dangerous and more expensive. (R., 458-459.)

44. In rejecting the testimony of said witness Courtenay in substance that the maintenance of the Railroad Company's right of way in proper condition is essential to the operation of the railroad as a carrier of freight and passengers, because, if the right of way be allowed to become unsafe, wrecks and disasters will occur. (R., 471-472.)

45. In rejecting the testimony of said witness Courtenay in substance that the methods of the Louisville and Nashville Railroad Company, for the maintenance and care of its rights of way at the present time, differ essentially from methods used ten or fifteen or

twenty years ago, and that these methods are continually changing and giving examples of where such changes have occurred, such as in the use of different kinds of machinery, in caring for the
323 right-of way, which formerly were not used. (R., 472-473.)

16. In rejecting the testimony of said witness Courtenay in substance that in a great many cases the operations of machinery used by the defendant in maintaining its right of way are obstructed by the existence of the line of the plaintiff and its various parts; that in hundreds of cases, the ditcher used by defendant for clearing its ditches, will strike the guy wires of plaintiff's line, either breaking the ditcher or the guy wire, and thus interfering with operations, and making them more difficult and expensive and less effective, that likewise in a great many cases, the machine used for spreading material on the right of way, will be interfered with by plaintiff's line and made less efficient and more expensive; that likewise, the operations of its steam shovel will be frequently obstructed by the maintenance of plaintiff's poles and other appliances, and thus made more difficult, less efficient and more expensive. (R., 473-474.)

17. In rejecting the testimony of the witness Courtenay, that with the growth of traffic over a railroad like that of defendant, it is required to increase its facilities in the way of additional sidetracks or lengthening existing tracks and putting in second tracks; and that this will be necessary in the case of defendant. (R., 475-476.)

18. In rejecting the testimony of the witness Courtenay in substance that in putting in new sidings or passing tracks or lengthening old ones, or building double tracks, the existence of the lines of the plaintiff upon the right of way of defendant will render it much more difficult and expensive to do this work, because the plaintiff's poles and other apparatus are in a great many cases on the very ground where the defendant would desire to put these new sidings or tracks, and even where the poles are not on the very ground to be thus occupied, they are, in many cases, so close to the place to be thus occupied, as to render them dangerous to trains operating over the new track; or they are upon fills or the sides of cuts, which will have to be changed, in order to construct the new tracks, the result of which would be that the poles would necessarily be in the way, all of which would make the operation of the railroad more expensive; that with the growth of traffic over the Louisville and Nashville Railroad in the past, it has found it necessary, and it will be necessary in the future, to lighten its grades in order that the same motive power may carry more traffic, and for the same reason, to straighten its curves, and that the presence of plaintiff's poles and other apparatus upon the rights of way would render this
324 more difficult and expensive, explaining in detail the reason why this is true. (R., 475-478.)

19. In rejecting the testimony of said witness Courtenay, in explaining how the movement of trains is governed by the defendant under its operations as they are conducted at the present time, and

in explaining that under this present mode of operation, the running of these trains will be made less safe or more dangerous by reason of the existence of plaintiff's lines of poles, wires, etc., upon the right of way, and in which testimony witness included an explanation of how the movements of trains on defendant's road are controlled, partly by time schedules, partly by telegraphic train orders, and partly by automatic block signals, and showing how the presence of plaintiff's poles and other apparatus on defendant's right of way interferes with the operations of the block signals, and also obscures the view by locomotive engineers of the signals which they must see in order to safely and properly control the trains under their charge. (R., 478-485.)

50. In rejecting the testimony of said witness Courtenay that the right to the exclusive possession of its right of way is a property right of very great value to a railroad company, and that in the operation of railroads, it is absolutely essential to safety, that the railroad should have control of all persons who come upon its right of way, and explaining why this is true. (R., 485-487.)

51. In rejecting the testimony of the witness Courtenay, in which he stated in dollars per mile on each Division of the road, the difference between the value to defendant of its rights of way occupied by the plaintiff, if it should have the exclusive use of said rights of way, and, on the other hand, what the value of such rights of way would be after plaintiff acquires the privilege of participating in the use thereof, by the construction, operation and maintenance of its telegraph line. (R., 487-491.)

52. In rejecting the testimony of the witness Courtenay that the value of what is known as the Main Stem, from Louisville to Bowling Green, of the Louisville and Nashville Railroad, over which plaintiff seeks to condemn a right of way, is \$8,045,964.15. (R., 498-491.)

53. In rejecting the testimony of said witness Courtenay, in which he offered to exhibit and read to the jury a written statement which he had prepared, showing the acreage of the property over which the right of way is sought to be condemned by plaintiff, being "Exhibit Courtenay No. 2." (R., 491-494.)

325 54. In rejecting the testimony of the witness Courtenay in substance that a great many poles of the plaintiff Telegraph Company are now located on the sides of cuts and slopes of fills of defendant, and that this is true to the extent of one-third thereof. (R., 494-496.)

55. In rejecting the testimony of the witness Courtenay, in substance that the topography of the country over which the defendant's right of way passes in Kentucky, and over which plaintiff seeks to condemn, is such as to make it necessary, in many cases, that plaintiff's employes, going along the right of way carrying poles and for other purposes, will be required to walk on the road-bed of defendant's railroad. (R., 496-497.)

56. In rejecting the testimony of the witness Courtenay, in substance that the obscuration of a locomotive engineer's view of signals along the right of way, is greater on curved tracks than on straight tracks, and that on account of the nature of the country through which it runs, there is a great deal of curvature in the tracks of defendant in Kentucky. (R., 497-498.)

57. In rejecting the testimony of the witness Courtenay, in stating what width is required for the roadbed of a single track, and what for the roadbed of a double track. (R., 498-499.)

58. In rejecting the testimony of the witness Courtenay, in substance that a telegraph pole, in order to secure safety, should be located at a distance from the nearest rail of the track equal to the length of the telegraph pole plus five feet. (R., 499-501.)

59. In rejecting the testimony of the witness Courtenay, in substance that the entire right of way now owned by defendant, and over which the plaintiff seeks to condemn a right of way, is necessary for the safe, convenient and economical operation of the railroad, and that in fact it needs more than it now has, and will be compelled to acquire more. (R., 501.)

60. In rejecting the testimony of the witness Courtenay, in substance that the presence of the plaintiff's poles and other attachments, will render it more difficult and more expensive to burn rejected cross-ties and bridge and trestle timbers, which constantly accumulate along the right of way of a railroad. (R., 501-502.)

61. In rejecting the testimony of the witness Courtenay, in substance, that on February 1, 1912, the Fourth Vice President of the defendant, who has charge of such matters, instructed him to locate a telegraph line along the entire right of way of defendant in Kentucky, and that he thereupon gave instructions to two of his
326 subordinates to do this work, and that they did so, and drew maps or plats of the location they had made and returned same to him, and that these are on file in his office and have been approved, and that the line thus shown is the selected line of defendant, and is substantially the same line as that now occupied by the line of the plaintiff; the reason for this being, that plaintiff's line was built on the best location for such a line; that this work of selection of a location for defendant's line, was completed between February 1, 1912, and May 1, 1912. (R., 503-504.)

62. In rejecting the testimony of the witness Courtenay, in which he offered to show by a statement marked "Exhibit Courtenay No. 3," the mileage of the several Divisions of defendant over which plaintiff seeks to condemn a right of way, and the value per mile of those several divisions, and the total value of each division, and the total value of the whole, aggregating \$53,694,618.01. (R., 505-506.)

63. In rejecting the testimony of the witness Courtenay, in substance, that the property of defendant will be damaged by the exist-

ce and maintenance of plaintiff's telegraph lines, and the value of defendant's said properties thereby diminished, as shown by a statement which the witness exhibited, marked "Exhibit Courtenay No. 5," and that the total value of the railroad properties involved is \$3,694,618.01, considered without the telegraph line upon it; and that the diminished value, with the telegraph line upon it is, in the aggregate, \$51,713,593.02, making the amount of damage or diminution in value, \$1,956,024.99, or an average of \$2,074.63 per mile. (R., 506-507.)

64. In rejecting the testimony of the witness Courtenay, in which he offered to show by a statement marked "Exhibit Courtenay No. 6," the actual cost to the defendant of all rights of way which have been acquired by it since 1905, along the different Divisions of the railroad involved in this proceeding. (R., 507-508.)

65. In rejecting the testimony of the witness Courtenay, in which he offered to show by a written statement, marked "Exhibit Courtenay No. 6," the cost to defendant of the rights of way which it had required within the limits of towns along the Divisions of defendant's road involved in this litigation since the year 1905. (R., 508.)

66. In rejecting the testimony of the witness Courtenay, in which he offered to show by a written statement, marked "Exhibit Courtenay No. 7," the conditions as to fencing along all the rights of way of defendant involved in this case, showing the number of miles of fencing on both sides of the road, and the percentage of the distance that is fenced on both sides, and the kind of fencing. (R., 508.)

67. In rejecting the testimony of the witness Courtenay in giving his reasons for his opinion that the properties of defendant over which plaintiff seeks to condemn a right of way are diminished in value by the existence and maintenance of plaintiff's telegraph line, and his reasons for his conclusions as to the extent of that diminution in value, in which testimony the witness explained in detail the various elements of the damage suffered by defendant by reason of the existence and maintenance of plaintiff's line, testifying to the following facts, to-wit (R., 509-518):

(1) That the Railroad Company is thereby deprived of the exclusive right of possession of its right of way, which is essential to safe and economical operation and management.

(2) That the cleaning of its ditches by machinery will be interfered with and rendered more tedious, less efficient and more expensive.

(3) That the spreading of material by machinery will similarly be interfered with and made more tedious and more expensive.

(4) That the borrowing of earth from one part of the right of way to put on another part of the right of way will be interfered with and rendered more tedious and expensive.

(5) That the clearing of the track in case of wrecks, which operation is conducted by machinery, will be interfered with and made more tedious and expensive.

(6) That the operation of pile drivers will be interfered with and made more tedious and expensive.

(7) That the storing of discarded cross-ties and bridge timbers, and the destruction thereof, will be rendered more expensive, because in many places the rights of way are so narrow that such material can not be burned at the place where taken out of the track without injuring the wires of the Telegraph Company, and will therefore have to be transported to other places to be burned.

328 (8) That the burning of weeds and underbrush and other vegetable growth along the right of way will be made more expensive, because necessary to have regard for the property of the plaintiff.

(9) That the portion of the right of way between the line of poles of plaintiff and the outer edge of the right of way, will be rendered practically useless.

(10) That the construction of additional sidetracks or the lengthening of old ones and the laying of second track and the changing of grades of tracks, the necessity for all of which comes from an increase in traffic, will be rendered more tedious and troublesome and more expensive, explaining the details of these operations.

(11) That the existence of the telegraph poles in the sides of cuts and fills, where they are exposed to the effect of wind and of sleet and snows, leads to the starting of slides which have to be watched and avoided, thus making additional expense.

(12) That it is frequently necessary for the defendant to blast upon parts of its right of way in moving material from one place to another; that in thus blasting, it will be necessary to have regard for the poles and wires of the plaintiff, in order to avoid injuring them, which will make the blasting process more expensive.

(13) That it is a necessity of modern railroad operation, that a railroad company have a telegraph line of its own for the operation of its trains, and it is necessary for the defendant to construct one, and this work and the maintenance of such a line will be interfered with and made more expensive by the existence of plaintiff's line.

(14) That the existence of plaintiff's line will interfere with the view by locomotive engineers of signals along the right of way, and will thus make operation more hazardous and more expensive.

(15) That the presence of plaintiff's line in proximity to defendant's electric signal wires, tends to make the operation of the latter less certain, and thereby increases the hazard of accidents.

329 (16) That the result of the foregoing considerations is that the maintenance of its right of way and the operation

of its trains will, by reason of the existence of plaintiff's line and the maintenance thereof by its employes, be rendered greatly more difficult, more tedious, more expensive, less efficient and more dangerous, all of which will depreciate the value of the property of the Railroad Company involved.

68. In again overruling the defendant's motion to read in evidence the different written statements offered by the witness Courtenay, after the court had been informed as to all of the witness Courtenay's testimony. (R., 518.)

69. In rejecting the testimony of the witness, S. O. Boulware, in substance that the fair and reasonable value of the right of way or strip of land occupied by the defendant as a right of way through Henry County, considered merely as land, without taking into consideration any work done or improvements placed upon it, is \$1,000 per acre; the witness having shown that he has long been a resident of that county and is familiar with the railroad and with the lands adjacent to the railroad through that county, and with the values thereof. (R., 519-521.)

70. In rejecting the testimony of the witness, J. R. Stout, in substance that the fair and reasonable value of the strip of land occupied by the defendant as a right of way through Carroll County, considering it merely as land, and not taking into consideration any work that may have been done upon it or improvements placed upon it, is \$700 per acre; the witness having previously shown by his testimony that he has long lived in that county and is familiar with the defendant's railroad through that county and with the lands contiguous thereto and the value thereof. (R., 521.)

71. In rejecting the testimony of each of the following witnesses, to wit:

Dr. J. B. Grant,

Geo. W. Ransler,

G. W. Young,

A. Alexander,

Hart Wallace,

Charles Connell,

Jas. H. Polsgrove,

E. L. Davis,

330 J. W. Bales,

G. B. Turley,

Abram Renick,

V. W. Bush,

M. C. Swinford,

Hanson Peterson,

A. E. Howe,

G. S. Griffin,

W. H. Dyer,

W. L. Glazier,

A. S. Thompson,

R. O. Duncan.

72. Each of whom testified to the same effect as the witnesses S. O. Boulware and J. R. Stout heretofore mentioned, except as to the counties in which they severally lived, and the values which they severally placed upon the railroad rights of way through their respective counties. (R., 522-530, 536-545.)

73. In rejecting the testimony of the witness W. H. Courtenay, when recalled, after he had been recalled with the consent of the court, and in refusing to allow him to answer the question as to what in his opinion is the real or actual value of the land sought to be taken by the Telegraph Company along the rights of way of defendant's railroad in Kentucky for a telegraph line of poles and wires and other fixtures, including in that value the right of plaintiff and its employes to enter upon defendant's rights of way and pass along and over the same, for the purpose of constructing, repairing and maintaining plaintiff's telegraph line; and in refusing to allow an avowal to be made as to what the witness would testify to in answer to said question, if allowed to answer it. (R., 531-535.)

74. In rejecting the testimony of defendant's witness, Vandament, in substance that in rebuilding the defendant's bridges on the line from Louisville to Cincinnati, and in extending passing tracks and raising embankments defendant had encountered plaintiff's poles that had to be removed before the work could be done; and in a number of instances had been delayed in the work on account of the failure of plaintiff to move the poles promptly, and that the poles had on this account been a very serious interference with the progress of the work. (R., 550-551.)

75. In rejecting the testimony of defendant's witness L. L. Adams, in substance that defendant had experienced interference from plaintiff's poles falling on its tracks in five places on 331 the Division with which that witness was familiar, enumerating the places, and giving the times when the poles fell and the number of poles that fell, etc. (R., 554-556.)

76. In rejecting the testimony of defendant's witness, S. B. Ringold, showing that in many places on a portion of the line referred to by the witness, the poles of the plaintiff's line are only about eight feet from defendant's track. (R., 559.)

77. In holding that the witness, W. H. Anderson, was not shown to be qualified to express an opinion as to the real or actual value of the land sought to be taken by plaintiff along the Kentucky Division of defendant, including the right for its employes to enter upon defendant's right of way and have ingress and egress over the same for the purpose of constructing, repairing and maintaining the telegraph line; said witness having shown by his testimony that he has been for twelve years Superintendent of said Kentucky Division, residing upon it; that his duties require him to continually pass up and down it; that he is familiar with the physical prop-

erties along it, both of defendant Railroad Company and plaintiff Telegraph Company; that he has for a great many years seen the employes of plaintiff going up and down the right of way in the work of maintaining and repairing plaintiff's telegraph lines; that he is entirely familiar with the Railroad Company's own methods of operation, and that he knows the values of lands through which the said Kentucky Division passes. (R., 562-574.)

78. In rejecting the testimony of said witness Anderson, as to what, in his judgment, is the actual value of the land sought to be taken by plaintiff, including the right of ingress and egress along the line of the Kentucky Division of defendant, over which condemnation is sought, taking the conditions to be just as he knows them to be, with the additional assumption that the number of telegraph poles required to be replaced per mile per annum averages from three to five; the witness stating just what his judgment is as to these values through the different cities and counties through which the said Kentucky Division of defendant runs. (R., 574-575.)

79. In rejecting the testimony of the said witness Anderson as to his judgment as to the actual value of the property sought to be taken by plaintiff along the line of the Kentucky Division including the right of ingress and egress over the same, for the purpose of constructing repairing and maintaining plaintiff's telegraph lines, taking the conditions to be exactly as the witness knows them to be and without any other assumption; the witness stating his judgment as to these values through the various cities and counties through which the said Kentucky Division passes. (R., 575.)

80. In rejecting the testimony of said witness Anderson, in substance that the existence and maintenance of plaintiff's telegraph poles and attachments along its Kentucky Division, would constitute and do now constitute a very great obstruction to and interference with the ordinary and economical operation of defendant's property, giving the details of the particulars of such interference, and which interferences, the witness stated, make the maintenance of the right of way and the operation of trains more difficult, dangerous and expensive. (R., 575-576.)

81. In rejecting the map offered in evidence by the witness O. L. Vandament, marked "Exhibit Vandament No. 3," being a map showing a sectional view of one mile of railroad with the poles and their cross-arms as they would appear, looking from one end to the other of the mile. (R., 577-578.)

82. In rejecting the testimony of the witness F. M. Cates, to the effect that the added expense caused to defendant for keeping grass and weeds cut along defendant's right of way, by reason of the presence of plaintiff's poles and appliances, is five dollars per mile per year. (R., 578-579.)

83. In rejecting the testimony of the witness, Milton H. Smith, President of the defendant company, in substance that increase of traffic over a railroad, requires increased facilities in the way of double tracking and sidings. (R., 582.)

84. In rejecting the testimony of said witness Smith, in substance that it is very probable that in the near future, the Louisville and Nashville Railroad Company will be compelled to and will largely increase its double track mileage and the mileage of its sidetracks on the lines involved in this case. (R., 582-583.)

85. In rejecting the testimony of said witness Smith, in substance that the loss in value to the Louisville and Nashville Railroad Company of its lines in Kentucky upon which plaintiff is now seeking to condemn a right of way, by reason of the right of ingress and egress over the same for plaintiff's employees, will be and is a thousand dollars per mile. (R., 583.)

86. In rejecting the testimony of said witness Smith, that the actual value of the land sought to be taken by plaintiff in this action, including the right of ingress and egress for its employees over defendant's right of way, is one thousand dollars per mile. (R., 584.)

87. In rejecting the testimony of said witness Smith, that the difference between the value of the rights of way of defendant involved in this case if it should have the exclusive use of its said rights of way and exclusive control thereover, and, on the other hand, the value of those rights of way without that exclusive use and with the right to a partial use in the plaintiff, would be and is an average of a thousand dollars per mile over the railroad lines in Kentucky involved in this proceeding. (R., 584-585.)

88. In rejecting the testimony of said witness Smith, that the damage to defendant, resulting in the diminution in value of its rights of way involved in this case, by reason of the construction, operation and maintenance of the lines of telegraph of plaintiff, would be and is \$3,000 a mile, which includes the \$1,000 a mile theretofore referred to as the value of the land taken, including the right of ingress and egress. (R., 585-586.)

89. In rejecting the testimony of said witness Smith, in substance that he is acquainted with the values of the lines of the Louisville and Nashville Railroad involved in this proceeding. (R., 586.)

90. In holding that said witness Smith was not qualified to testify or give an opinion upon any facts in this case (R., 585); said witness having testified that he has been in the railroad business more than fifty-six years, and been connected with the defendant, Louisville and Nashville Railroad Company, in various capacities from the close of the war between the States to the present time, with the exception of one short interval of about three years; that in the course of his experience, he has served as Telegraph Operator, as

Local Freight Agent, as General Freight Agent, as Roadmaster, as Traffic Manager, and as Chief Executive; that he is thoroughly familiar with the cost of construction of railroads, including acquisition of rights of way, having given this matter close personal attention; that he has purchased a number of railroads in Kentucky for defendant, and that he is familiar with the operations of defendant's various lines in Kentucky, with the traffic over the same, and profits from the same, and is from these various sources of information familiar with the value of defendant's properties over which plaintiff seeks to condemn a right of way. (R., 579-582.)

91. In rejecting as evidence a copy of Resolutions of the Board of Directors of the Louisville and Nashville Railroad Company, marked "Exhibit Fugina No. 1," being resolutions which, among other things, authorized, empowered and directed the President to install approximately twenty-five hundred miles of electric automatic block signal devices, which resolutions were objected to, not for lack of authentication of the copy, but as irrelevant. (R., 587, 404-406.)

92. In rejecting the testimony of the witness Fugina, in substance that early in 1912, he was directed by the President of defendant to make a plan or schedule for the installation of 2,500 miles of automatic signal lines; that he made such schedule, which embraced 900 miles of construction in Kentucky; that 300 miles of this construction in Kentucky has been completed, and 600 miles remain to be done; that the construction of the 300 miles began in June, 1912, and was finished just about the first of the present year, 1916, and that he has just received instructions to proceed with this work of installation in Kentucky. (R., 587-589.)

93. In rejecting the testimony of the witness Fugina, in substance that the poles of defendant's signal lines thus far constructed in Kentucky, are on the same side of the track with the poles carrying the Western Union's lines, to the extent of a fraction over 65 miles. (R., 589.)

94. In rejecting the testimony of the witness Fugina, in substance that the efficiency of the automatic electric telegraph lines of defendant is impaired by the presence and existence of the telegraph line of plaintiff, explaining the particulars or details of this impairment. (R., 589-591.)

95. In rejecting the testimony of the witness Fugina, in substance that the average cost of constructing a mile of automatic signal line is \$2,000. (R., 591.)

96. In rejecting the testimony of the witness Fugina, in substance that in the regular course of business in the operation of defendant, reports come to the witness as Signal Engineer of the Louisville and Nashville Railroad Company, showing interferences with the operation of the electric signal system, and accidents resulting therefrom, and in refusing to allow these reports to be read to the jury,

they being reports as to when and where and how the interferences took place and the result thereof. (R., 391, 357-361.)

97. In refusing to allow to be read in evidence certain reports of the Interstate Commerce Commission to Congress, showing the judgment of the Interstate Commerce Commission to the effect that the installation of the automatic electric block signal system is
335 greatly conducive to safety of operation of trains, and recommending that its installation and use should be required. (R., 592, 315-328, 365.)

98. In rejecting the testimony of W. H. Wolfenberger, a locomotive engineer, in substance that the existence of the Western Union's poles and wires along the right of way, obscures greatly a locomotive engineer's view of signals by which he must be controlled in operating his engine along the railroad, and giving the details as to many places where this obstruction to view takes place, and explaining the nature and extent of the obstruction. (R., 592-594.)

99. In rejecting the testimony of each of the following locomotive engineers, to-wit, N. W. Duvall, Geo. L. Ihrig, James F. McGarr, James P. McKenna and W. F. Lane; the substance of the testimony of each of whom was the same as that of the witness W. H. Wolfenberger, the witness mentioned in the next preceding assignment. (Bill of Exceptions No. 2, R., 546. Bill of Exceptions No. 1, R., 272-282.)

100. In rejecting and refusing to receive in evidence the paper marked "Exhibit Bradford No. 1," being a statement prepared by the witness, C. O. Bradford, showing the widths of rights of way of defendant, and the divisions of its road on which they occur, where the right of way is only 40 feet in width, or less. (R., 576, 314-315.)

101. In rejecting the testimony of the witness, P. R. Bettison, in substance that he had been instructed by the Chief Engineer of defendant, about February 1st, to locate a telephone line on defendant's right of way in Kentucky along the Divisions involved in this suit, and that he, assisted by defendant's Superintendent of Telegraph, had made such location between February 12, 1912, and May 1, 1912, being substantially the same location as that now occupied by plaintiff; that he had indicated this location on the right of way maps, and had reported same to the Chief Engineer; the location being the best that could be found on defendant's right of way from an economical as well as a physical standpoint. (R., 596-597.)

102. In rejecting and refusing to receive in evidence a written statement offered by said witness Bettison, showing the places on 944.7 miles of defendant's road, where plaintiff Telegraph Company is now occupying, and seeking to condemn, the only available side of the right of way for a telegraph line, and where it is impractical-

336 ble for the defendant to construct another line on the opposite side, and showing the reasons therefor; and also rejecting and refusing to receive in evidence a statement accompanying the statement just mentioned, showing in substance the estimated additional cost to defendant Railroad Company of building its lines of poles and wires over the roads involved in this suit by reason of the present location of plaintiff's poles and wires; and also in rejecting and refusing to receive a statement showing the basis of these estimates of additional cost; said three statements being bound together as one exhibit marked "Exhibit Bettison A." (R. 596-599, 644-645.)

103. In rejecting the testimony of said witness Bettison, in substance that defendant could not operate its railroad in Kentucky without the use, either of a telephone or telegraph line. (R., 599.)

104. In rejecting and refusing to receive in evidence exhibit marked "Exhibit Bettison C" showing the places on defendant's line in Kentucky where, if plaintiff be allowed to occupy its present location, it will be necessary to use defendant's tracks in some manner in order to renew plaintiff's poles. (R., 600.)

105. In rejecting and refusing to receive in evidence the maps marked respectively "Exhibit Bettison D," "Exhibit Bettison E," "Exhibit Bettison F," "Exhibit Bettison G," showing poles, guys and braces on certain designated miles of defendant, each map covering ten miles, and the witness testifying that the maps were correct. (R., 600-601.)

106. In excluding the statement offered in evidence by the witness V. E. Furnas, marked "Exhibit Furnas No. 1," showing a list of rights of way of defendant sought to be condemned by plaintiff, and extra cost and expense defendant would be forced to pay to build and maintain its telegraph and telephone lines, on account of the plaintiff having the choice location. (R., 603-604, 644-645.)

107. In rejecting and refusing to receive in evidence various photographs, showing conditions existing at different places on the lines of defendant sought to be condemned herein, being marked "Exhibit Photographs Nos. 1 to 82," and also "Exhibits Photographs Nos. 83, 84 and 85." (R., 604-608.)

108. In rejecting the testimony of each and all of forty witnesses (other than those hereinbefore mentioned) each of whom showed himself qualified to speak and to give an opinion upon the value of the land in his county contiguous or adjacent to the Divisions
337 of defendant's railroad therein, and to each of whom the following question was put:

"What in your opinion is the fair, reasonable value per acre of the strip of land occupied by the Louisville and Nashville Railroad Company as its right of way through your county, considering it merely as land, without taking into consideration any work done or improvements placed thereon."

Each of which witnesses would have given an answer to said question and would have given a value per acre to the land involved in the question, which answer would have shown an average value of \$500 per acre outside of cities and towns, and not less than \$1,000 per acre within cities and towns. (R., 608-609.)

109. In rejecting the testimony of the witness, Richard Wathen, in substance that the value of the land actually occupied by the Western Union Telegraph Company on defendant's right of way in Bullitt County and of the right of ingress and egress and the right to go over the same as sought in this proceeding is \$1,000 per mile, said witness having testified that he had lived for thirty years in Bullitt County and was acquainted with the value of land in that county and knew the location of defendant's line through that county and the value of lands adjacent to it, and was acquainted with the plaintiff's telegraph line on said right of way. (R., 601-602.)

110. In rejecting the testimony of the witness, W. C. Montgomery, in substance that the value of the land actually occupied by plaintiff on the defendant's right of way through Hardin County and of the right of ingress and egress and the right to go over the same as sought in this proceeding is \$1,000 per mile, said witness having testified that he had lived in Hardin County forty-six years, living all that time near the right of way; that he was acquainted with the location of the defendant's right of way through that county, that he had experience in buying and selling lands in that county and was acquainted with the value of lands in that county including lands lying adjacent to defendant's right of way and he was also acquainted with the location and general method of construction of plaintiff's telegraph line on the west side of the right of way of defendant, that he had traveled over defendant's road very often and had had his attention directed to this matter heretofore, as he was a witness on the former trial. (R., 602-603.)

338 111. In rejecting the testimony of the witness, J. E. Willoughby, shown to have been a Civil Engineer of large experience, now the Chief Engineer of the Atlantic Coast Line Railroad Company, and for many years Civil Engineer in the employment of the Louisville and Nashville Railroad Company, and familiar with its lines in Kentucky, in substance that plaintiff's employees make, and in the future necessarily will make, as much use of that particular zone of the right of way within which the Telegraph Company's poles and their attachments are located, as the employees of defendant make or will make. (R., 612-613.)

112. In rejecting the testimony of said witness, Willoughby, in answer to the question: "What in your opinion is the value of the land taken by the Western Union Telegraph Company, including in that term, the right of ingress and egress necessary for the maintenance of its line?" (R., 611.) In answer to which said witness would have stated in detail, substantially as follows:

"There is a certain zone of the railroad right of way, embracing the telegraph poles and the points at which their side attachments, to-

wit, guy wires and brace poles, enter the ground, which zone would be about sixteen feet in width, which the Telegraph Company's employees will use certainly as much as the Railroad Company's employees use the same, and it would be proper that the Telegraph Company should pay one-half the value of this strip. This strip sixteen feet wide and one mile long, contains 1.1 acres, and if extended 845.83 miles (over which the witness had lately made an inspection trip) would include 1,607 acres; and knowing, as I do, the value of the lands through which these roads pass, and making an average, it is my opinion that \$400 an acre is the fair and reasonable average value of the lands included in the right of way, which is without considering the cost of clearing and grading the land or otherwise improving it. On this basis, the value of the strip sixteen feet wide for 845.83 miles would be, and is \$642,800. One-half of this is \$321,400, and this latter sum I believe to be the actual value of the land taken by plaintiff within the 845.83 miles mentioned, which valuation includes the right of ingress and egress for plaintiff's employees." (R., 613-616.)

113. In rejecting the testimony of the witness Willoughby, in answer to the following question:

339 "State whether or not in your opinion the right of way of the Louisville and Nashville Railroad, such as is left to it after the taking of the space for these poles by the Western Union Telegraph Company with its right of ingress and egress, is or will be damaged or diminished in value by the construction and maintenance of the telegraph line by the Telegraph Company, as you know it to exist; and if so, state how and in what respects it is thus damaged?" (R., 621.)

To which the witness would have answered in substance as follows:

"In estimating the damages that would accrue to the remainder of the right of way, as set forth in the question, I have considered only the damages to the improvements upon the right of way, including, however, in that term, the grading of the roadbed. In my opinion the existence of the telegraph line and its maintenance and operation, will undoubtedly hinder and obstruct the operations of the Railroad Company and make the same less efficient and more expensive, and will thus diminish the value of the railroad property. I group into five classes a number of items which I think constitute obstructions to the operation of the Railroad Company, by reason of the existence of the telegraph line. These groups are substantially as follows:

Group A.

(1) The loss by the Railroad Company of the exclusive control of its right of way.

(2) The inconvenience and damage to the Railroad Company growing out of the right of the Telegraph Company to move its poles and other construction material across the track from side to side, thus establishing innumerable permissible crossings at rail level.

(3) Interference with the free use by the Railroad Company of that part of its right of way lying between the pole line and the outer limits of the right of way.

Group B.

(1) The physical injury to the Railroad Company's property other than the strip of land taken for joint use, by the transportation across same by the Western Union of its material and employees in constructing and maintaining its line of poles.

(2) The obstruction to drainage, which would be occasioned by the pole line and guy wires and methods employed by the Western Union in constructing, maintaining and renewing its pole line.

(3) Interference with the delay that will be occasioned to the Railroad Company's construction and maintenance work by the Telegraph Company's line, including in this, the limitation upon the Railroad Company's use of power machinery in maintenance and construction work, and the regard which it will be compelled to have for the rights of the Telegraph Company.

(4) The limitation of the Railroad Company and the inconvenience and expense resulting therefrom in constructing its own telegraph, telephone and signal lines.

Group C.

(1) The injury growing out of the obstruction to view of engineers and other employees of the Railroad Company of the track signals and signs erected for the government of the movement of trains.

Group D.

(1) The limitation of the Railroad Company's use of its right of way for the purpose of storing cross-ties and other construction material.

(2) The limitation of the Railroad Company's freedom of burning old cross-ties and other timbers.

(3) The limitation of the Railroad Company's clearing operations.

Group E.

(1) The injury which will result to the Railroad Company's property by reason of telegraph poles and wires being broken down by wind storms and sleet and other acts of Providence.

(2) The injury occasioned to the employees of the Railroad Company by the existence of the poles, guys and braces of the Telegraph Company in the rights of way along which the employees of the Railroad Company are required to move and do move.

As to the last element of damage or injury, to-wit, that of Sub-section 2 of Group E, I would not assign a large amount of
341 damage, certainly not over five per cent of the whole."

And the witness would then have stated that in his judgment the entire damage which will be produced by the foregoing causes (which does not include the value of the land in the right of way, as heretofore explained) would be \$1,633,650, which amount he divided up, showing the amount of damage to the property embraced within the various divisions of the road, and showing that in case of each division the amount of damage was a certain percentage of the value of the improvements on the right of way in that division, excluding the land value in the right of way. (R., 621-624.)

114. In rejecting the testimony of the witness, C. A. Wilson, in substance that the value of the land occupied by the poles and other structures of the plaintiff Telegraph Company, in connection with the easement which it seeks to acquire over the rights of way of the Railroad Company, including the perpetual right of ingress and egress over those rights of way for the purpose of constructing, maintaining and repairing the telegraph lines, is \$400,000. (R., 629.)

115. In holding that the witness, Wilson, was not qualified to give an opinion upon the matter referred to in the last preceding assignment, although said witness had testified to a very wide and extended experience as a railroad engineer, in the construction, operation and maintenance of railroads, mostly in the State of Ohio and some in the State of Pennsylvania, and to a wide experience in railroad valuations, acting under employment of State Railroad Commissions and the Interstate Commerce Commission, and acting as arbitrator in the settlement of disputes between railroads, and between railroads and contractors, and that he had lately traveled over the lines of the defendant, Louisville and Nashville Railroad Company, involved in this action, for the special purpose of observing the character of the property of both the Railroad Company and the Telegraph Company, and had made detailed memoranda concerning the same. (R., 624-628.)

116. In rejecting the testimony of the witness Wilson, that in his opinion the balance of the property of the defendant involved in this litigation will be damaged by the construction and maintenance and operation of the telegraph line of plaintiff, to the extent of diminishing the value of the railroad property, in the sum of \$650,000, of which \$450,000 is on account of interference
342 with the operation of the railroad company in the care of its property and operation of its trains, and \$200,000 is on account of interference with the development or expansion of the railroad, such as building double track and sidetracks, and changing the grade of lines, and character of curves, and that it will be interfered with by the existence of the telegraph line, and much of which extension and expansion will probably come and must necessarily come in the near future. (R., 629-630.)

117. In rejecting the testimony of the witness, Hunter McDonald, in substance that in his judgment the property of the Louisville & Nashville Railroad Company, to-wit, the lines involved in this suit is damaged to the extent of diminishing the value thereof on an average of \$2,000 per mile by the existence and maintenance of the plaintiff's lines, including in that the taking of the right of ingress and egress for the Telegraph Company's employees over the right of way of defendant, this being by reason of the interference with the maintenance of the Railroad Company's right of way in the usual method of maintaining same, and interference with the operation of trains by obscuring the view of engineer's signals and other operations, the details of which the witness was prepared to give. (R., 636-637.)

118. In holding that the witness, Hunter McDonald, was not qualified to testify upon the questions involved in this case, though he had testified that he had been the Chief Engineer of the Nashville, Chattanooga & St. Louis Railway, running through Kentucky, Tennessee, Alabama and Georgia, since 1892, which railway has a mileage of 1,230 miles, exclusive of sidings and second track, amounting to 400 miles, that he has had charge, in addition to the ordinary duties of a Chief Engineer, of the real estate department of the railroad company, including the acquisition of rights of way; that the State of Tennessee, through which the Nashville, Chattanooga & St. Louis Railway runs, is very similar in character to the State of Kentucky; that the Nashville, Chattanooga & St. Louis Railway runs through different parts of the State of Tennessee which are topographically very similar to the different parts of Kentucky through which the Louisville and Nashville Railroad runs; the engineering problems in the two States being very similar; that he is familiar with the major part of the lines of the Louisville and Nashville Railroad in Kentucky involved in this litigation; that over certain lines, such as from Nashville to Louisville and on to Cincinnati, and between Nashville and Henderson, and between Bowling
343 Green and Guthrie, he has traveled over them very frequently, and had lately gone by a special train over all the lines involved in this litigation except a few small branches, for the purpose of making an inspection trip anticipatory of testifying as a witness in this case, on which trip he had observed the character of country through which the lines run, the character of construction of the railroad lines, the position and character of the Telegraph Company's lines, the character of business done by the Railroad Company over its lines, and the relationship that the properties of the Telegraph Company occupied towards those of the Railroad Company. (R., 636-637.)

119. In rejecting the testimony of the witness, R. R. Hobbs, in substance that the total wire mileage of the Western Union Telegraph Company on the rights of way of the Railroad Company involved in this suit, is 7,181.3 miles. (R., 642.)

120. In rejecting the testimony of the witness Hobbs, as to the extent of mileage of telephone lines erected by defendant along the

rights of way of the several Divisions of its road involved in this case. (R., 642-643.)

121. In rejecting the testimony of the witness Hobbs, in substance that defendant has on plaintiff's poles on its rights of way involved in this suit 1,431.69 miles of wires, which includes not only telephone and telegraph wires, but signal wires. (R., 643.)

122. In rejecting the testimony of the witness Hobbs, in substance that he concurred in the quantities and distances set forth in the statement embraced in "Exhibit Bettison A," and that the prices or cost of the work set forth therein are in his judgment reasonable, with the exception of amount given therein per mile for overbuilding the telegraph line of the plaintiff, which the witness would place at \$140.75 per mile, whereas Mr. Bettison placed it at \$118.50 per mile; that the witness is familiar with the price of materials, which are higher now than when the estimate was made in 1914. (R., 644-645.)

123. In rejecting the testimony of the witness Hobbs, in substance that a telegraph line can be used for telephone purposes by applying proper instruments, and vice versa. (R., 645-646.)

124. In rejecting the testimony of the witness Hobbs, that according to his best judgment, the plaintiff has from thirteen to fifteen men and troublemen on the lines in Kentucky, exclusive of ordinary laborers engaged in the work of replacing poles. (R., 646-647.)

125. In rejecting the testimony of the witness, A. S. Baldwin, and in refusing to allow him to answer the following question:

"What in your opinion is the value of the land taken, including that term the right of ingress and egress over the rights of way of the Louisville and Nashville Railroad Company which the Western Union Telegraph Company is seeking to condemn in this case? State also whether or not in your opinion the values of the property of the Louisville and Nashville Railroad Company involved in this case, to-wit, its rights of way, are damaged or diminished in value by reason of the existence and maintenance of the lines of the Western Union Telegraph Company?" (R., 650.)

To which question, the witness would have answered substantially as follows:

In my judgment, there are two forms of damage to be considered:

(1) The capital sum to be fixed on account of the joint use of the right of way of the Railroad Company acquired by the Western Union Telegraph Company, and the damage or cost to the Railroad Company on account thereof.

(2) The annual expenditures which will be necessarily made by the Railroad Company in the upkeep and protection of the property jointly used, of which the Telegraph Company will be the bene-

ficiary—a fair proportion of which should be assessed against the Telegraph Company, as one of the inherent values of the right of way acquired. These annual charges should be capitalized and added to the sum to be paid by the Western Union Telegraph Company.

The Western Union employees will necessarily use a strip, say sixteen feet wide, of the right of way, within which is located the poles and guy wires, etc., of the Telegraph Company, much more than they use other parts of the right of way—much more, for example than they use that part of the right of way which is on the other side of the railroad track from the pole line. In my judgment, it would be fair to charge the Western Union with about one-third of the value of this sixteen-foot strip. The average width of the right of way of the Louisville and Nashville Railroad involved in
345 this case is about sixty-six feet. Sixteen feet, therefore, would be about one-fourth the average width of the right of way. In my opinion, therefore, the Western Union should be charged for the width of this strip to the extent of one-third thereof, which would practically be one-twelfth of the whole right of way. (One-third of one-fourth.) And for the balance of the right of way, they probably make a use thereof equal to one-sixth, or in other words, one-sixth of three-fourths of the right of way, which is three-twenty-fourths. Taking these two factors together, we have two twenty-fourths plus three twenty-fourths, which is five twenty-fourths, or about one-fourth of the whole.

I have seen a statement made by W. H. Courtenay, Chief Engineer of defendant, in which he gives in round figures \$5,753,000 as the total value of the right of way of defendant involved herein, not including therein the cost of grading, clearing and otherwise improving the right of way, which was ten per cent of the total value of the improved right of way, including all improvements on the right of way. To the above figure, however, of \$5,753,000, there should be added ten per cent of 4,000,000 of additions and betterments not included in the above figure, or in other words, \$400,000, thus making the total value of the right of way, exclusive of improvements on the right of way, about \$6,150,000. One-fourth of that sum is \$1,537,500, which I consider is the value of the right of way for 1,075 miles, and which is the extent of right of way which I lately examined. This is an average of \$1,430 per mile.

I should explain, however, in saying that this is the value of the right of way, that this includes certain elements which might be considered as consequential damages, to-wit:

(1) Frequent delays to the railroad company on account of the inability to have wires and poles moved rapidly.

(2) Telegraph Company gains the benefit of constant policing of the right of way by section gangs and track walkers, who put out fires, keep off encroachments and keep up a general supervision of the property.

(3) Damage and delay may be caused to trains of the Railroad Company through poles and wires of the Telegraph Company falling on the right of way, due to wind storms, sleet storms, snow storms and other Acts of Providence.

(4) All the lines of the Railroad Company must, and will eventually be, in all probability, protected by some form of block signals. The cost of wiring these signals and the protection of same will be enhanced by the presence of the poles and the wires of the Telegraph Company; and there is always danger of broken wires falling cross signal wires and producing false signals. The Railroad Company, in losing the exclusive control of its right of way, loses a right which is of great value; and by being compelled to divide the control, is put at a great disadvantage, in that it cannot subject the employees of the Telegraph Company to the rules and discipline of the Railroad Company.

(5) The view of locomotive engineers operating trains along the rights-of way of the Railroad Company will be obscured and are obscured, as I have personally seen, by these telegraph poles and cross-arms and wires, etc.

In addition to the foregoing elements of damage, which I have included in the estimate of \$1,430 a mile, are the following elements of damage:

Priority of Location.

On account of the Western Union having occupied the best location for a telegraph line, the defendant, in constructing its own wire line for telegraph, telephone and signal wires, will be put to additional cost above what otherwise would have been the case, which excess will, in my judgment, be practically \$123 a mile, including in that estimate the cost of overbuilding in certain places the existing line of the Telegraph Company.

Damage on Account of Pole Line Interference With Steam Shovels, etc., and With Borrowing Operations.

A Railroad Company is frequently compelled to borrow dirt from one part of its right of way to be used on other parts. It also maintains its right of way by powerful machinery, such as ditchers, spreaders, pile drivers, steam shovels, etc., the operations of which would be greatly interfered with by the existence of the pole line of the Telegraph Company. On account of these interferences, the damage will amount, in my judgment, to \$250 a mile, which is the amount of diminution in value on that account, which, in my opinion, the Railroad Company's right of way will suffer from this last mentioned item.

Wire Interference from Blasting.

A large part of the right of way of the Louisville and Nashville Railroad in Kentucky involved in this case is through rocky land,

so that when excavations are required, blasting will be necessary for economical operation; and if this is done in the proximity of telegraph wires, special precautions will have to be taken to avoid injuring these wires, and this will add an extra cost above what would exist but for the presence of these telegraph wires, and which cost, in my judgment, will average \$37.50 per mile.

Summarizing the foregoing items of capital damage, they are as follows:

Right of way and consequential damages per mile, . . .	\$4,430.00
Priority of location, per mile,	68.00
Building and renewal of high pole lines per mile,	65.50
Interference with steam shovels, wrecking trains, borrowing, etc., per mile,	250.00
Interference with blasting, per mile,	37.50
Total per mile,	<u>\$1,841.00</u>

Proceeding to the annual charges which I think should be capitalized in arriving at values, the following is the statement:

Cleaning the Right of Way.

The right of way has to be cleaned and cut annually, a considerable portion of it twice a year. A sixty-six foot strip makes eight acres per mile. Assuming that two acres of this is taken out for tracks and ditches, six acres will remain to be cleared and cut, which, at five dollars per acre, makes an average annual expenditure of \$30 per mile. Distributing this proportion of cost under the
 348 same ratio as was used in connection with the acquisition of rights of way, it would be one-fourth of \$30 per mile, or \$7.50 per year, which, capitalized at five per cent, is \$150 per mile. If the Telegraph Company had its right of way separate from the railroad right of way, it would be compelled to do this cutting, clearing and cleaning work, but being on the railroad right of way, it will continue to get the benefit of that work done by the Railroad Company.

Fencing.

The Railroad Company necessarily protects a large part of its right of way by fences. I would judge about the same proportion of the L. & N. Railroad is fenced as of the Illinois Central, on which the average cost of fencing for the past five years has been \$18.80 per mile. Assigning to the Telegraph Company one-fourth of this, we have \$4.70 per mile, which, capitalized at five per cent, equals \$94 per mile.

Increased Cost of Piling and Handling Material, Burning, etc.

Where old ties are taken from the track, bridge timbers and other material removed and gleanings from the right of way are accumu-

lated for burning, the extra cost is involved on account of the fact that it must be trucked or carried to places where there will be no danger to the poles or wires. This is a continual expense to the Railroad Company, the amount of which is hard to estimate, but I estimate it at a cost of \$10 per mile, which, capitalized at five per cent is \$200 per mile.

The summary, therefore, of annual charges capitalized, is as follows:

Cleaning right of way, per mile.....	\$150.00
Fencing, per mile	94.00
Increased cost of piling material and burning ties, etc., per mile	200.00
Total per mile	<u>\$444.00</u>

Adding this sum to the capital sum heretofore found, \$1,841, makes a total damage or diminution in value, by reason of the condemnation by the Telegraph Company, of \$2,285 per mile.

349 In referring, and in a certain sense using, the estimate of Mr. Courtenay as to the values of the rights of way mentioned by me, I will say that I went over those estimates carefully, and with my knowledge of existing conditions and costs, the estimates of Mr. Courtenay are not only conservative as to the values of the rights of way, including the improvements thereon, but are low. (R., 650-655.)

126. In holding that the witness, Baldwin, was not qualified to give an opinion upon the matters concerning which he was interrogated, and concerning which he offered to testify, although it appeared from the testimony of said witness that he has for more than ten years been Chief Engineer of the Illinois Central Railroad; that he has had charge of the maintenance of road way, tracks and bridges, the construction of all new lines and all construction of every character, including acquisition of new rights of way; that he does not simply draw plans and supervise the erections, but that the entire cost of work comes under his direct supervision; that he was an engineer in the employment of the Louisville and Nashville Railroad Company for fourteen years before going to the Illinois Central; that while in the employment of the Louisville and Nashville Railroad Company, he was principal assistant for some time in the Chief Engineer's office; that he was afterwards Roadmaster on the Main Stem, First Division from Louisville to Bowling Green, and the branches in connection therewith; that he was frequently over the lines of the Louisville and Nashville Railroad Company other than the Main Stem while he was in the employment of the company; that he went over them frequently on annual inspection tours and occasionally took trips for different purposes; that he had on various occasions experience in acting as arbitrator in controversies between railroad companies or between railroad companies and contractors, involving railroad operations, construction, etc.; and that he was acquainted with the value of the rights of way and improvements on

the rights of way of the Louisville and Nashville Railroad involved in this case. (R., 649-650, 655-656.)

127. In admitting in evidence the testimony of and a tabulated statement prepared and introduced by the witness W. W. Ryder, a witness for plaintiff, purporting to show in terms of acres, the total space actually occupied by the poles, brace poles and guy wires of plaintiff, on the different divisions of defendant's road involved in this proceeding, and showing the total of all of same to be 3.26 acres, being "Exhibit Ryder No. 1." (R., 659-662.)

128. In admitting in evidence the written offer of November 30, 1911, from plaintiff to defendant, by which plaintiff, prior to the institution of this proceeding, offered to pay defendant the sum of \$5 per mile of defendant's right of way for the right to permanently maintain its poles, wires, cables and appliances for the operation of its telegraph business, on, along and upon the lands, rights of way, bridges, viaducts, tunnels, and other structures of the Louisville and Nashville Railroad Company in the State of Kentucky. (R., 676-680.)

129. In refusing to charge the jury as requested by the defendant, as follows:

"The jury should find for defendant, the Louisville and Nashville Railroad Company, such sum as they believe from the evidence is the value of the land and rights taken by plaintiff, the Western Union Telegraph Company, out of and over the rights of way of said Railroad Company, including the right of said Telegraph Company to have its employes enter upon, and pass over and along, and to use, the railroad rights of way for the purpose of maintaining, repairing, or reconstructing the telegraph lines.

And in addition to the foregoing the jury should also find for defendant Railroad Company any additional sum by which they believe from the evidence the remainder of the right of way left to the Railroad Company is damaged in the diminution of its value for railroad purposes by reason of the construction, operation, and maintenance of the telegraph lines upon the railroad rights of way. And in considering this element of damage the jury should consider any interference with, or obstruction to, the use of the defendant's rights of way which they believe from the evidence the telegraph lines will cause, and which will make the Railroad Company's use of its said property more difficult, or dangerous, or less convenient, economical, or efficient, and which will therefore, in the judgment of the jury, render the Railroad Company's said property less valuable for railroad purposes." (R., 689.)

130. In charging the jury as follows:

"The entire quantity of land actually taken and occupied by the plaintiff in the 942.83 miles of railroad is only 3.26 acres in separate places large enough to hold the poles, braces and guy wires in spaces some 150 feet apart, and we think the jury have not been supplied by defendant with any competent evidence to show a greater value

for everything the law authorizes the defendant to recover than the amount offered by plaintiff (referring to an offer made by plaintiff, before the institution of the proceedings, to pay defendant \$5.00 per mile of railroad involved for the rights sought to be acquired by plaintiff; being an offer made in attempted compliance with a provision of the statute as a condition precedent to the right to condemn). A verdict for anything beyond that sum would be a mere speculative and fanciful guess, and not a legitimate deduction from facts proved." (R., 688, 690-692.)

131. In charging the jury as follows, to-wit:

"The defendant, as we have seen, took upon itself the burden of showing that it was entitled to more than the amount of the plaintiff's offer. According to our view the defendant has not met that burden, and has not, after giving it the benefit of every inference fairly to be drawn from the testimony, shown itself to be entitled to a greater sum than the amount offered. Certainly any amount exceeding that sum should be nominal. In short, our conclusion is that the testimony does not show that the value of the land actually taken and occupied by the telegraph lines, when that value is added to or supplemented by the value of the right of ingress and egress, and when to the sum of both there is also added the amount of actual damages to accrue from any diminution in value of the remainder of defendant's right of way for railroad purposes by the construction, maintenance and operation of the telegraph lines thereon in the manner set forth in plaintiff's petition, will, in the aggregate, exceed the amount offered by the plaintiff." (R., 687-688, 690-692.)

132. In peremptorily directing the jury to find the following verdict, to-wit:

352 16. Exhibits Bettison D, E, F, and G, maps and diagrams, with P. R. Bettison's testimony.

17. Exhibits Photographs Nos. 83, 84 and 85.

18. Exhibits Courtenay Nos. 5, 6 and 7, with W. H. Courtenay's testimony.

It is further stipulated and agreed between counsel for the plaintiff and defendant that this stipulation shall be carried out as above set forth under such rule or order as to the court may seem proper to enter herein for the safe keeping, transporting, and return of such original papers and exhibits.

This 29th day of June, 1916.

RICHARDS & HARRIS,
HUMPHREY, MIDDLETON &
HUMPHREY,

Attorneys for Plaintiff.

HELM BRUCE,
EDWARD S. JOUETT,
HENRY L. STONE,

Attorneys for Defendant.

353

Clerk's Certificate.

I, A. G. Ronald, Clerk of the District Court of the United States for the Western District of Kentucky, at Louisville, do hereby certify that the foregoing Transcript, consisting of 352 pages, contains full, true and complete copies of all the pleadings, record entries and proceedings in a certain cause in said court wherein the Western Union Telegraph Company is plaintiff and the Louisville & Nashville Railroad Company is defendant, copied herein in accordance with the precept of the plaintiff-in-error to be found on pages 271-274 of this record, and precept of defendant-in-error to be found on page 295 of this record, as full, true and complete as the originals thereof which remain on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, in this district, this 26th day of February, in the year of our Lord, one thousand nine hundred and twenty-one and of the Independence of the United States the one hundred and forty-fifth.

[Seal District Court of the United States, Wes. Dist. Ky.]

A. G. RONALD,
*Clerk of the District Court of the United States
for the Western District of Kentucky.*

354 Filed Jan. 25, 1921. A. G. Ronald, Clerk.

District Court of the United States for the Western District of
Kentucky.

No. 88.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff-in-Error,

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Defendant-in-
Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss.*

The President of the United States to the Honorable the Judges of
the (District) Court of the United States for the Western District
of Kentucky, Greetings:

Because in the record and proceedings, as also in the rendition of
the judgment of a plea which is in the said District Court, before
you, or some of you, between Western Union Telegraph Company
plaintiff, and Louisville and Nashville Railroad Company, defendant,
a manifest error hath happened to the great damage of the said

plaintiff, Western Union Telegraph Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

355 Witness the Honorable Edward Douglass White, Chief Justice of the said Supreme Court, the 25th day of January, in the year of our Lord one thousand nine hundred and twenty-one.

Attest:

[Seal District Court of the United States, Wes. Dist. Ky.]

A. G. RONALD,

*Clerk of the District Court of the United States
for the Western District of Kentucky.*

Allowed by

WALTER EVANS,

United States District Judge.

Endorsed on cover. File No. 28,166. W. Kentucky D. C. U. S. Term No. 809. Western Union Telegraph Company, plaintiff in error, vs. Louisville & Nashville Railroad Company. Filed March 18th, 1921. File No. 28,166.

(4113)

COPY BOUND

Supreme Court of the United States, Oct. Term, 1921.

#259.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant in Error.

Stipulation.

It is hereby stipulated that in copying and printing the record in the above entitled cause, there was omitted a form of judgment tendered on December 18, 1920, and called for by the schedule, and which should immediately follow the motion of December 18, 1920 to enter same, which motion is found on Page 184 of the printed record, and that the form of the judgment thus tendered was and is as follows, to wit:

"This day came the parties hereto, by counsel, and it appearing to the Court from the opinion of the United States Circuit Court of Appeals for the Sixth Circuit in the case of Louisville & Nashville Railroad Co. vs. Western Union Telegraph Co. on appeal from the decree of this Court in the Equity suit of Western Union Telegraph Co. vs. Louisville & Nashville Railroad Co. (#165) that said Circuit Court of Appeals has decided that the power of said Western Union Telegraph Co. to condemn the property of the Louisville & Nashville Railroad Co. sought to be condemned in this action was withdrawn by the State of Kentucky by the act of its General Assembly, approved March 14, 1916, heretofore pleaded in this action, and that said withdrawal took place before any rights had become vested in the Western Union Telegraph Co., and that this action or proceeding must, therefore, fail, it is now, therefore, ordered, adjudged and decreed by the Court that for said reasons the order heretofore entered overruling the motion to dismiss this action be, and it is hereby, set aside, and that this action for said reasons be, and it is now hereby, dismissed, and that defendant recover of plaintiff defendant's costs herein expended, for which it may have execution."

ALEX'R POPE HUMPHREY,

For Plff. in Error.

HELM BRUCE,

For Deflt. in Error.

[Endorsed:] File No. 28,166. Supreme Court U. S., October Term, 1921. Term No. 259. Western Union Tel. Co., P. E., vs. L. & N. R. R. Co. Stipulation and addition to record. Filed Dec. 29, 1921.

(5513)

CLOSE IN CENTER



FILED

DEC 12 1921

WM. B. STANLEY

CLERK

No 259

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,
versus

**LOUISVILLE & NASHVILLE RAILROAD
COMPANY, - - - Defendant in Error.**

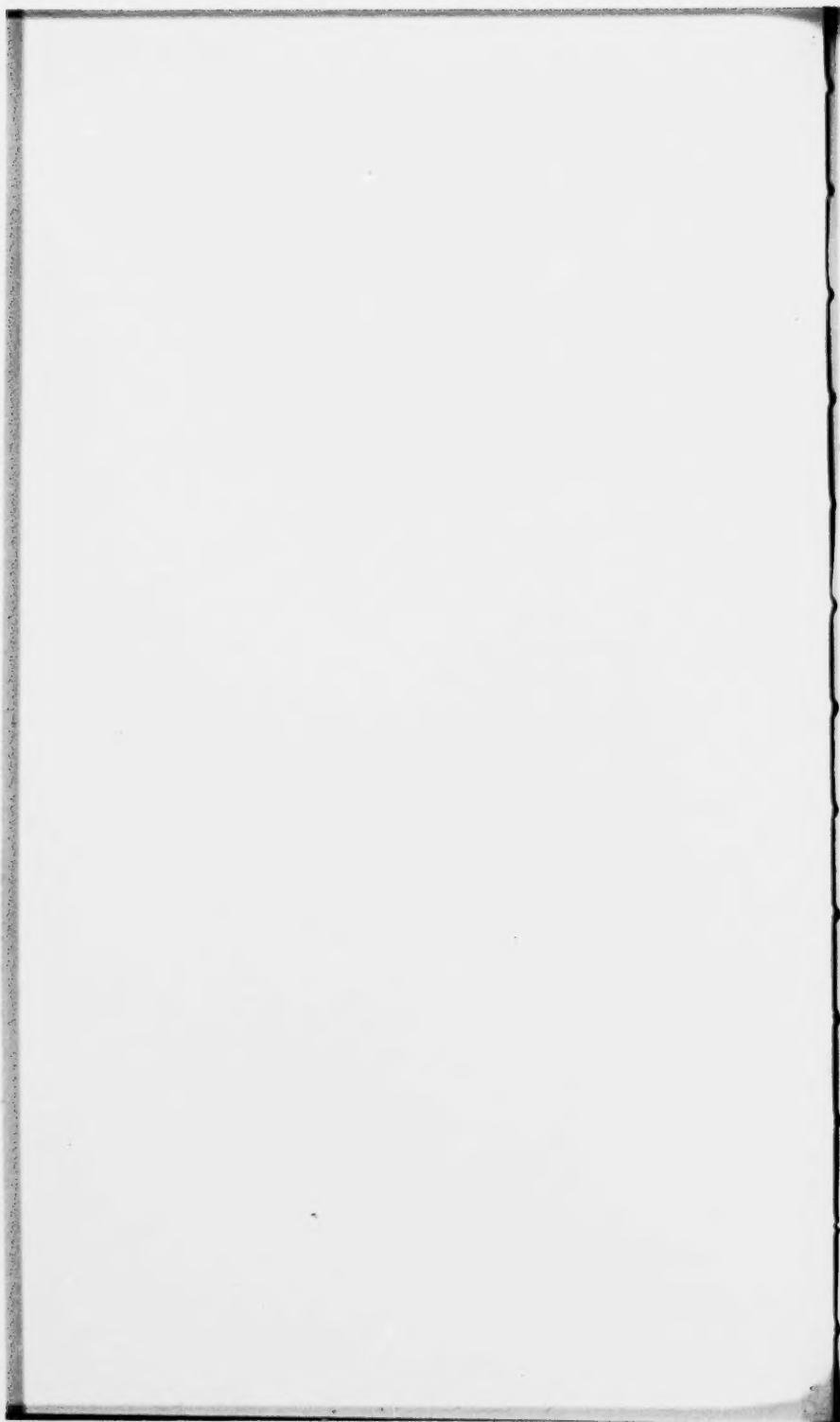
BRIEF FOR PLAINTIFF IN ERROR.

ALEXANDER POPE HUMPHREY,
*For Western Union Telegraph Company,
Plaintiff in Error.*

**RUSH TAGGART,
FRANCIS R. STARK,
W. OVERTON HARRIS,**
Of Counsel.

December 10, 1921.

Westerfield-Bonte Co., Incorporated, Louisville, Ky.



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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,
vs.

LOUISVILLE & NASHVILLE RAILROAD COM-
PANY, - - - - - *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

The opposing parties in this case are the Western Union Telegraph Company upon the one hand and the Louisville & Nashville Railroad Company on the other. For convenience we will hereafter refer to them as the Telegraph Company and the Railroad Company.

On August 17, 1884, the Telegraph Company and the Railroad Company entered into a contract under the terms of which the Telegraph Company was to occupy the right of way of the Railroad Company in various States, among others, Kentucky. Each of the parties to the contract was to render service to the other, these reciprocal services forming the con-

sideration for the contract. The period of this contract was twenty-five years and until thereafter put an end to by one year's notice given by either party. The Telegraph Company, for reasons not necessary to be set forth, gave notice that this contract should be considered as terminated on August 17, 1912. In December, 1911, the Telegraph Company instituted proceedings in condemnation in the Jefferson County (Kentucky) Court. It, however, discontinued these proceedings in the state court (R. 41, 42), and on July 9, 1912, filed this proceeding in the District Court of the United States for the Western District of Kentucky, seeking to condemn an easement over the right of way of the Railroad Company in the State of Kentucky. This proceeding was taken under an act of the Legislature of Kentucky approved March 19, 1898, being Section 4679c of Carroll's Kentucky Statutes. A copy of this act is printed in the appendix. (Appendix, p. 73.)

In August, 1912, the Railroad Company gave notice to the Telegraph Company, requiring it to remove its structures from the right of way of the Railroad Company; and gave warning that a failure so to remove by December, 1912, would be regarded as a forfeiture to the Railroad Company of all structures of the Telegraph Company remaining upon the Railroad Company's right of way (R. 38).

Thereupon the Telegraph Company filed a bill in equity in the said District Court, alleging its occupancy of the right of way of the Railroad Company

in Kentucky and in other States embraced in the above-mentioned contract. The bill further alleged that the Telegraph Company was proceeding to acquire a right of way in all these States, and asked the court to enjoin the Railroad Company from carrying out its threats as above mentioned until such condemnation proceedings should be determined. This proceeding was based upon the case of Winslow v. Baltimore & Ohio R. R. Co., 188 U. S. 646.

The court of first instance granted a temporary injunction, and upon appeal by the Railroad Company this order was affirmed. L. & N. R. R. Co. v. Western Union Tel. Co., 207 F. R. 1.

The mileage over which the easement was sought to be condemned in this case was about 1,000 miles.

In the instant case (which is, of course, the condemnation case) issues were made up by appropriate pleadings. The answer of the Railroad Company disclosed that its property was covered by a number of mortgages, some embracing all the Kentucky mileage and others only parts of it (R. 48).

The proceedings in the condemnation case came on for trial before a jury and resulted in a verdict and judgment, on April 3, 1913 (R. 104). The amount of the award was \$500,000. The Telegraph Company did not pay this award but entered a motion for a new trial May 3, 1913 (R. 107). The court granted this new trial on December 13, 1913 (R. 110), filing a memorandum opinion (R. 110). On December 15, 1915 (R. 122), the Tele-

graph Company moved the court to try itself the question as to whether the operation and maintenance of the telegraph structures on the right of way over which an easement was sought to be condemned would interfere with the ordinary use of such right of way, or the ordinary travel and traffic thereon, or with any other telegraph line already constructed on such right of way. This motion was sustained on December 20, 1915 (R. 125). On January 29, 1916, the court found this issue in favor of the Telegraph Company (R. 131).

The question as to the amount of compensation to be awarded the Railroad Company then came on to be heard before a jury (R. 140). On February 16, 1916, the following judgment was entered (R. 141):

“In this case the claim of the Western Union Telegraph Company to have condemned to its use the right to construct, maintain and operate its lines of telegraph upon the right of way of the defendant, the Louisville & Nashville Railroad Company, in this State in the manner hereinafter described was submitted on February 16, 1916, to the jury heretofore impaneled and sworn herein, and said jury on the same day, under the court's instruction, returned a verdict as follows:

“ ‘We the jury assess the damages and just compensation to be paid the Louisville and Nashville Railroad Company by the Western Union Telegraph Company to be five thousand dollars.

‘G. L. Haydon,

One of the Jury.’

"The right of way of the Louisville & Nashville Railroad Company above referred to is as follows:

	Miles
Main Stem, Louisville to Tennessee State line	139.33
For a part of this distance there is at present a line of telegraph on both sides of the right of way, but where this is the case this judgment is to apply only to the west side of the right of way.	
Lebanon Branch, Lebanon Junction to Sinks	107.1
Cincinnati Division, Louisville to Newport	106.76
Lexington Branch, LaGrange to Lexington	65.7
Shelby Branch and Shelby Cut-off, Anchorage to Christiansburg	27
Kentucky Division, Covington to Corbin .	184.1
Paris & Lexington Branch, Paris to Lexington	17.6
Knoxville Division, Corbin to Tennessee State line and Saxton to Jellico	32.9
Cumberland Valley Division, Corbin to Virginia State line	46.7
Memphis Line, Memphis Junction to Guthrie	46.5
Owensboro & Nashville Division, Russellville to Owensboro	71.4
Henderson Division, Guthrie to Henderson	97.74
Total Mileage	942.83

"It is adjudged that the petitioner is to have the right perpetually to construct, maintain and operate its lines of telegraph consisting of poles, wires and fixtures, over, upon and along said

right of way above described, and to occupy said right of way, including bridges (subject to the exceptions hereinafter stated), tunnels, trestles and viaducts of the defendant Railroad Company, now occupied by the petitioner with its poles, wires and appurtenances, and to maintain and operate its said line of telegraph where now placed and located, or hereafter constructed, subject to such changes of location in said right of way as the necessities of the Railroad Company may require, together with a right and easement on the part of the Western Union Telegraph Company to enter on and over said right of way and above described structures of said Railroad Company for the purpose of maintaining, rebuilding or reconstructing the said telegraph line along the same.

“It is, however, provided that the following bridges, over which the plaintiff has now no telegraph lines, are excluded herefrom, viz.:

- (1) Bridge over the Kentucky River at Fords.
- (2) Bridge over the Kentucky River at Frankfort.
- (3) Bridge over the Cumberland River at Pineville.
- (4) Bridge over the Cumberland River at Williamsburg.
- (5) Bridge over the Barren River at Bowling Green.
- (6) Bridge over the Licking River at Newport.

“It is further provided that this judgment shall not apply to the following bridges over which the plaintiff now has its lines, to wit:

- (7) Bridge over the Kentucky River at Worthville.

- (8) Bridge over the Green River at Munferdville.
- (9) Bridge over the Green River at Livermore.
- (10) Bridge over the Ohio River between Newport and Cincinnati.
- (11) Bridge over the Ohio River between Henderson and the Indiana State line.

“It is further adjudged as follows:

“That in any removal or reconstruction of said telegraph line, no more land along the right of way of the defendant Railroad Company shall be used than that now occupied by the petitioner.

“That the Railroad Company shall have the right to take from that part of the right of way over which the wires of the petitioner may be strung, all the dirt, gravel, sand, stone, water and other materials of every kind and character that the Railroad Company may need from time to time, and in the event said right of way is cut down or the grade thereof changed in any manner, the petitioner is to reset its poles and its wires at its own expense, upon due and reasonable notice in writing to that effect, so as to make them conform to such new grade; and said poles shall not be so set as to interfere with any ditch, drain or culvert or other work or structures of the defendant.

“That in the event the defendant Railroad Company shall at any time desire to change the location of its tracks, or to construct new tracks, or to construct new depots or other buildings, or to change the location of same where any of the petitioner's poles or wires are located upon its right of way, the petitioner shall remove its said poles and wires at said points to any other part of the defendant's right of way adjacent thereto designated by the defendant, upon due and rea-

sonable notice in writing to that effect, and at the expense of the petitioner.

"That the petitioner shall assume all the risks of its poles, wires, insulators and cross-arms, and shall hold the defendant, the Louisville & Nashville Railroad Company, harmless from any damage to any of the petitioner's property occasioned by the burning of grass or undergrowth upon said railroad right of way; and said petitioner shall have no right to fence any of said right of way nor in any manner to exclude the defendant therefrom.

"That upon payment of the above award, either to the defendant, Louisville & Nashville Railroad Company, or to the clerk of this court, and all costs in this behalf expended by the defendant, the petitioner, the Western Union Telegraph Company, may continue in the occupancy of said property of the defendant Railroad Company, and continue to appropriate so much thereof as is above described.

"Unless the petitioner shall pay the amount of said award and costs as aforesaid on or before the 1st day of June, 1916, the petitioner shall be deemed and considered to have abandoned this proceeding to condemn the property and rights above described, over, on and along the said railroad rights of way of the defendant for the construction, operation and maintenance of a telegraph line thereon, and all rights thereto acquired under this judgment shall be deemed and considered to have been forfeited by the petitioner, and the defendant shall be entitled to recover of the petitioner, and is hereby adjudged, its costs herein expended, for which execution may issue.

"That in the event the Western Union Telegraph Company shall pay the amount of said award to the clerk of this court, then the Clerk

of this court shall mail written notice of these proceedings and of the award to the Trustees hereinafter named in the mortgages set out in the answer of the defendant herein, to wit:

“Central Trust Company of New York,
Trustee under mortgage dated June 1,
1880.

Central Trust Company of New York,
Trustee under mortgage dated June 2,
1890.

United States Trust Company, Trustee under mortgage dated April 30, 1887.

Mercantile Trust Company of New York,
Trustee under mortgage dated November 1, 1881, executed by Louisville, Cincinnati & Lexington Railway Company.

United States Trust Company of New York, Trustee under mortgage dated April 1, 1905.

Central Trust Company of New York,
Trustee under mortgage dated December 6, 1879, executed by Evansville, Henderson & Nashville Railroad Company.

Metropolitan Trust Company of New York, Trustee under mortgage dated July 1, 1887, executed by Kentucky Central Railway Company.

Central Trust Company, Trustee under mortgage executed by Owensboro & Nashville Railroad Company, dated November 1, 1881.

“The payment of the amount of said award shall not be made by the petitioner to the clerk of this court if the defendant shall obtain and file with him on or before the 15th day of May, 1916, written releases or waivers by the Trustees aforesaid of their right or claim to have the amount of said award, or any part thereof, paid

to the clerk of this court, and consenting that the same may be paid to the defendant.

"To all of the foregoing judgment the defendant, Louisville & Nashville Railroad Company, excepts.

"That execution of this judgment is suspended until April 5, 1916, in order to give to each party time in which to file a petition for a new trial; and time is given to each of the parties until June 1, 1916, to tender a Bill of Exceptions herein."

On March 8, 1916, the Telegraph Company paid into court the amount of the award and costs (R. 144).

By its terms the execution of the judgment was suspended until April 5, 1916, in order to give to each party time in which to file a petition for a new trial. No such petition was filed.

On June 29, 1916, the Railroad Company sued out a writ of error from the Circuit Court of Appeals. We quote from the order allowing this writ:

"On consideration whereof the court does allow the writ of error upon the defendant's giving bond according to law in the sum of \$500, said bond *not to operate as a supersedeas.*" (R., 147.) (Our italics.)

This writ of error coming on to be considered in the Circuit Court of Appeals, the judgment in the condemnation suit was reversed (L. & N. R. R. Co. v. W. U. Tel. Co., 249 F. R. 385) and sent back for a new trial. For the mandate see R., 149.

In the meanwhile the Legislature of Kentucky had passed an act approved March 14, 1916, which is as follows (R., 202) :

“An Act to protect Railroad Companies in the use and enjoyment of their rights of way by forbidding the condemnation thereof for other purposes.

“Be it enacted by the General Assembly of the Commonwealth of Kentucky:

“Sec. 1. That no part of the right of way of any railroad company, or any interest or easement therein, shall be taken by any condemnation proceedings, or without the consent of such railroad company, for the use or occupancy of any part of such right of way, on, over, and along such right of way longitudinally by any telegraph, telephone, electric light, power or other wire company, with its poles, cables, wires, conduits, or other fixtures; provided, that nothing in this section shall be construed as preventing any such wire company from obtaining the right to cross the right of way of a railroad company, under existing laws in such manner as not to interfere with the ordinary use or ordinary travel and traffic of such railroad company's railroad.

“Sec. 2. That all acts and parts of acts in conflict with this act be and the same are hereby repealed.”

Under the terms of the Constitution of the State of Kentucky, however, this act did not become a law until June 12, 1916. The validity of this act or its application to these proceedings is the storm-center of this controversy.

The fact of the passage of such a law was not brought to the attention of the Circuit Court of Appeals in the argument of the writ of error in the condemnation case; nor is its existence in any way alluded to in the opinion of that court. As stated above, the judgment was reversed. On March 10, 1919, the Railroad Company tendered an amended answer in the injunction suit, of which we have above spoken; set up the passage of the above-mentioned act and insisted that its effect was to put an end to the condemnation suit, and, therefore, that the temporary injunction above granted should be modified so as to exclude Kentucky from its terms. At the same time it moved the court to dismiss this suit (R., 160).

This application to dismiss the condemnation suit took the form of an amended and supplemental answer filed by the Railroad Company February 15, 1919 (R., 155), to which the Telegraph Company replied, insisting that the above-mentioned act was unconstitutional and void both under the Constitution of the State of Kentucky and the Constitution of the United States (R. 157, 160). The Railroad Company demurred to this reply, and the court, taking the matter under consideration, filed an opinion which is found in the record at R., 161. The opinion was delivered upon the motion to modify the injunction as well as upon the motion to dismiss the condemnation suit. The learned district judge held that the above mentioned act was unconstitutional, and

thereupon denied the motion to dismiss the condemnation suit (R., 183), and also overruled the motion to modify the injunction (R., 184). Thereupon the Railroad Company appealed from the order overruling the motion to dissolve the injunction.

The Circuit Court of Appeals held that the order of the District Court denying the motion to dissolve the temporary injunction should be reversed, and that the interlocutory injunction should be set aside so far as the State of Kentucky was concerned.

Two opinions were delivered by the Circuit Court of Appeals—an original opinion (R., 201), and an opinion denying a petition for rehearing (R., 209). These opinions may also be found in 268 F. R. 4.

The Telegraph Company applied to this court for a *certiorari*, but this was denied (254 U. S. 650).

These proceedings in the Circuit Court of Appeals were, of course, in the injunction suit, and not in the condemnation suit, and related only to the interlocutory injunction granted as we have above set forth. The Railroad Company entered a new motion December 18, 1920, to dismiss the condemnation suit (R., 184). On January 20, 1921, the Telegraph Company tendered an amended reply and also its objections, in writing, to the motion of the Railroad Company to dismiss the action. The Railroad Company filed a demurrer to the reply as amended, and the court ordered that all said motions be submitted.

On January 22, 1921, the court entered an order

providing that the orders entered on April 30, 1919, carrying the Railroad Company's demurrer back to the Telegraph Company's reply, and sustaining the demurrer to the amended and supplemental answer, and overruling the Railroad Company's motion to dismiss the action, be and they were all thereby set aside (R., 185). The order also recites the filing of the amended reply by the Telegraph Company and the written objections of the Telegraph Company to the motion of the Railroad Company to dismiss the action. It also recites the filing by the Railroad Company of a demurrer to the Telegraph Company's amended reply. It further adjudges that the demurrer to the reply as amended be sustained, to which the Telegraph Company excepted, and thereupon the Telegraph Company declined to plead further. The court then declares that it is now considered that the aforementioned act of March 14, 1916, was constitutional, and that at the time it was passed no vested right had been acquired by the Telegraph Company to any property or right sought by it to be condemned or taken herein. The court further adjudged that no provision in said act of March 14, 1916, violated the Constitution of Kentucky, and that no clause or provision of said act violated the provisions of the Constitution of the United States or any amendment thereto. It was thereupon adjudged that the Telegraph Company's petition herein should be and it was dismissed.

The amended reply of the Telegraph Company is found at R. 186, and distinctly sets up the various objections to the act of March 14, 1916, including the assertion that the act was violative of the Constitution of the State of Kentucky and the Constitution of the United States, particularly the Fourteenth Amendment of the Constitution of the United States. The objection to the motion to dismiss (R., 187) also raises the constitutional questions.

On January 25, 1921 (R., 188), a petition was filed for writ of error, which was allowed (R., 191), bond to operate as a supersedeas being executed (R., 190), and the citation being duly served (R., 192).

ASSIGNMENT OF ERRORS.

The errors assigned are as follows (R., 189):

“The plaintiff, Western Union Telegraph Company, states that the judgment entered herein January 22, 1921, is erroneous, for the reasons herein set forth, which are hereby assigned as errors of the court.

“1. The court erred in dismissing the petition herein.

“2. The court erred in holding that the act of the Legislature of Kentucky pleaded by the defendant herein as having been passed March 14, 1916, and going into effect June 12, 1916, put an end to the right of the plaintiff to continue the prosecution of these proceedings.

“3. The court erred in holding that the above-named act, when properly construed, applied to these proceedings.

“4. The court erred in failing to hold that said act was unconstitutional in that it was a

legislative interference with a judicial proceeding, and violative in that respect of the Constitution of the State of Kentucky, and of the Constitution of the United States, and particularly the Fourteenth Amendment of the Constitution of the United States.

"5. The court erred in failing to hold that the judgment entered herein February 16, 1916, having been satisfied by the payment of the amount of damages and costs on March 8, 1916, vested in the plaintiff an easement over the right of way of the defendant as therein described, and that said act if it should be construed as applying to these proceedings, would be violative of the Constitution of the State of Kentucky and of the Constitution of the United States, particularly the Fourteenth Amendment of the Constitution of the United States, in that if applied to these proceedings it would divest the plaintiff of a right vested in it by said judgment and the performance thereof, and in that way would be the taking of the property of the plaintiff without due process of law, and would deny to the plaintiff the equal protection of the laws.

"6. The court erred in holding that the amended and supplemental answer of the defendant filed herein February 15, 1919, was sufficient in law to put an end to the proceedings herein and to cause this suit to be dismissed; for that the said act therein pleaded, if properly construed, is not applicable to this proceeding; and if construed as applicable to this proceeding is violative of the Constitution of the State of Kentucky and of the Constitution of the United States, especially the Fourteenth Amendment of the Constitution of the United States, in that it would deprive plaintiff of its property without due process of law, and deny to plaintiff the equal protection of the laws.

“Wherefore plaintiff prays that said judgment be reversed and said District Court be required to enter an order reversing said judgment of said District Court; that the court will fix the bond with supersedeas to be executed by the plaintiff.”

The jurisdiction of the District Court was originally invoked upon the ground of diversity of citizenship.

After a trial and judgment, the Railroad Company (defendant) prosecuted a writ of error from the Circuit Court of Appeals, and that court, finding error in the manner of trial, directed a new trial. At this stage of the litigation the Railroad Company pleaded the Act of March 14, 1916, as putting an end to the case. The Telegraph Company insisted that the above Act was unconstitutional. The District Court, having in mind the opinion of the Circuit Court of Appeals in the equity suit, held the Act valid and dismissed the petition. The plaintiff (Telegraph Company) then sued out the present writ of error. Its purpose is not to review any decision of the Circuit Court of Appeals as to how the case shall be tried, but to determine whether the case shall be tried at all. This involves a question of constitutional law and the jurisdiction of review is in this Court.

Memphis v. Cumberland Tel. Co., 218 U. S. 626.

It will, we think, be seen from the above statement that a very important question of constitu-

tional law, as well as of statutory construction, is involved in this controversy. We will endeavor to show that under the settled jurisprudence of the State of Kentucky, where a judgment of condemnation has been entered and the condemnor has paid into court the amount of damages ascertained by the jury, the condemnor acquires a vested right to the easement involved. We will endeavor to show that while there may be subsequent proceedings, yet these proceedings are simply for a new ascertainment of the amount of compensation, and that while the condemnor may be required to pay more, or (in case of the condemnor's appeal after judgment and payment into court) less than the original judgment, still the granting of a new trial for the purpose of ascertaining the true amount of compensation does not affect the title which vests in the condemnor by the entry of the judgment and payment of the award. If this is true, then it is believed that the Legislature can not interfere, and that the case must go on to a final determination as to this *quantum* of damages.

It is true that in the case at bar the Telegraph Company was in possession, but exactly the same principle would apply if the Telegraph Company had not been in possession, but had entered by virtue of the judgment of condemnation, and pending the appeal had built its line.

We will endeavor further to show that by reason of a general statute of construction in force at the time that this law was passed, it could not be made

to apply to the instant case, but must be regarded as only prospective in its application. The terms of this Kentucky statute of construction will be given hereafter, and will be found to be similar to the Federal statute applied in *Great Northern Co. v. United States*, 208 U. S. 452.

We will further attempt to show that under the settled jurisprudence of the State of Kentucky it is not competent for the Legislature, where a suit is pending between two private individuals, to alter the law to the advantage of the one or to the disadvantage of the other, but that any such effort upon the part of the Legislature is, under the jurisprudence of Kentucky, violative of the Constitution of the State of Kentucky as an attempt by the Legislature to control a judicial function.

There is no difference that we can find in the jurisprudence of Kentucky between the result of a proceeding in condemnation for the building of a railroad and for the building of a telegraph line. It seems to us to be a startling proposition that after a judgment of condemnation and payment of the amount awarded in compensation, the condemnor shall have only what the learned Circuit Court of Appeals, in its opinion in the equity suit, denominates as "a present and perhaps contingent possession," with the result that the railroad company or the telegraph company, as the case may be, must wait until the final determination of the condemnation proceeding, through all the courts to

which it may be carried, and through all the new trials on appeals which may result, to begin the construction of a public work. In other words, the title of the condemnor must be kept in the air until the final determination of the litigation, and the condemnor must be put to the risk of not only having its title destroyed, but the improvements which it has put on the land forfeited to the landowner by legislative fiat.

The vital importance of this question is apparent when we consider that if the judgment of dismissal herein entered is to stand, not only will the Telegraph Company have its main lines cut in two, excluding them from the trunk lines of the Railroad Company running through Kentucky, but the Railroad Company will be allowed to confiscate the poles and wires of the Telegraph Company extending over 942 miles of its railroad, or at most the Telegraph Company will be permitted to remove such poles and wires from such right of way. It is obvious that upon such removal the poles and wires will be reduced to a value only equal to junk.

In order to present this matter to the Court with any degree of clearness it will be necessary for us to go at some length into what is the jurisprudence of the State of Kentucky (1) as to condemnation proceedings and the effect of the various steps taken therein; and (2) as to the jurisprudence of the State of Kentucky in reference to statutes which are at-

tempted to be construed as applicable to pending litigation.

AS TO CONDEMNATION PROCEEDINGS.

The Constitution of the State of Kentucky has the following provision in regard to the appropriation of private property for public use:

"Sec. 242. Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by them which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction. The General Assembly shall not deprive any person of an appeal from any preliminary assessment of damages against any such corporation or individual, made by commissioners or otherwise; and upon appeal from such preliminary assessment, the amount of such damages shall, in all cases, be determined by a jury, according to the course of the common law."

It will be observed from reading this section that it provides for two things: (1) that compensation must be paid before taking; (2) that the Legislature must provide for a jury trial to determine what this compensation shall be. Further than this the Constitution does not go, and it is obvious that the Legislature may or may not grant an appeal from a judgment entered after a jury trial. In other words, it is perfectly competent for the Legislature to provide that after the condemnor shall have paid the

amount fixed by the jury an irrevocable title shall vest in the condemnor without any right of appeal upon the part of the condemnor or of the landowner, or to grant such an appeal not with the effect of disturbing a vested title and the destruction of work done under it, but for a further ascertainment of the amount of compensation.

There is no general statute in Kentucky prescribing the method of condemnation in all cases. One kind of proceeding is provided for one public purpose, and a different proceeding for another public purpose.

Most of the cases on this subject have arisen under the statute fixing condemnation proceedings for railroads. We give that statute in the Appendix: Sections 835, 836, 837, 838, 839 and 840, Carroll's Kentucky Statutes.

The substance of the statute may be stated very briefly:

A railroad desiring to condemn land applies to the county court to appoint commissioners. These commissioners view the land sought to be taken and assess the compensation to be paid to the owner. The report of the commissioners is filed in the county court. If there are no exceptions, the railroad company pays the amount and is entitled to the land. If there are exceptions by either party, then the case is tried before a jury in the county court. Either party may appeal, and the case is tried *de novo* in the circuit court. The statute then provides:

"Upon the confirmation of the report of the commissioners by the county court of the assessment of damages by said court as herein provided, and the payment to the owners of the amount due is shown by the report of the commissioners when confirmed, or is shown by the judgment of the County Court when the damages are assessed by the said court, and all costs adjudged to the owner, the railroad company shall be entitled to take possession of said land and material and to use and control the same for the purpose for which it was condemned, as fully as if the title had been conveyed to him. When an appeal shall be taken from the judgment of the county court by the company it shall not be entitled to take possession of the land or material condemned until it shall have paid into court the damages assessed and all costs."

Observe this language "When the amount has been paid the railroad company shall be entitled to take possession of said land and material and to use and control the same for the purpose for which it was condemned as fully as if the title had been conveyed to it."

There is no provision in this statute for the execution of a deed. Title passes, if it passes at all, by virtue of the judgment, although, in some instances, deeds are executed; but there is no statute requiring this.

In the telegraph statute which we are here considering (see Appendix, p. 73) the seventh section provides for the form of judgment, and concludes as follows:

"Now upon payment of said award either to the defendant or to the clerk of this court, and all costs in this behalf expended, said telegraph company may enter upon said land and appropriate so much thereof as may be necessary, as prayed for in its petition."

No provision is made in the telegraph statute for any conveyance, but the form of the judgment is as given above, and, we submit, there could be no more apt word used to express the passage of title than the word "appropriate."

The word "appropriate" is defined as follows by Webster:

"The act of setting apart or assigning to a particular use in exclusion of all others.

"Application to a special use or purpose, as of a piece of ground for a park."

In Words and Phrases Judicially Defined, 466, under the head of "Appropriate," we find the following, in each instance authority being cited:

"The word 'appropriate' means to set apart for or assign to a particular person or use in exclusion of all others."

Again:

"To appropriate is to allot, assign, set apart or apply in any way to the use of a particular person or thing for a particular purpose."

Again:

"To appropriate is derived from the Latin *ad* and *proprius*, and means to take as one's own

by exclusive right. A thing cannot be appropriated to the use of any one person as long as any one else is allowed the use of it also."

Again:

"To appropriate is to make a thing one's own; to make it the subject of property; to exercise dominion over the object to the extent and for the purpose of making it subserve one's own proper use or pleasure."

Other authorities are cited under the head of "appropriate," 1 Words and Phrases, 2nd Series, p. 256.

To reduce as has been done by the opinion of the Court of Appeals the meaning of this word "appropriate" to "the right to a present and perhaps contingent possession," is, we submit, with due respect (and to borrow from Mr. Roosevelt) to bleed the life out of the veins of a strong word "as a weasel sucks eggs."

For a great many years the constitutions in force in the State of Kentucky have provided that private property cannot be taken for public use unless compensation has first been made. But it was at one time held that it was competent for the Legislature to provide that the condemnor could take the property upon the execution of a bond to pay the compensation that should be awarded to the landowner. This was in the early history of the Commonwealth. See

Gashweller v. McAvoy, 1 A. K. Mar. 84 (December 2, 1817).

Jackson v. Winn, 4 Litt. 323 (December 10, 1823).

Duncan v. Mayor of Louisville, 8 Bush, 105 (September 9, 1871).

And these cases were cited, as establishing the law, in Tracy v. E. L. & B. S. R. R. Co., 80 Ky. 259, decided May 16, 1882.

This has become, however, only a matter of historical interest because the Court of Appeals of Kentucky in the case of Covington Short Route Co. v. Piel, 87 Ky. 263 (May 24, 1888), decided that this was not the rule except in cases where property was being appropriated to municipal use. It was there held that the railroad condemnation statute (which at that time allowed the condemnor to enter, upon the execution of a bond) was unconstitutional in that respect.

This case was followed by the cases of:

Asher v. L. & N. R. R. Co., 87 Ky. 391.

Carrieco v. Colvin, 92 Ky. 342.

C. St. L. & N. O. R. Co. v. Sullivan, 24 Ky. L. R. 860, s. c. 80 S. W. 791.

Bushart v. County of Fulton, 183 Ky. 471.

The last named case disapproved of the rule of these old decisions even as applicable to property taken by municipalities.

It may therefore be taken as the settled law in Kentucky that under ordinary circumstances a condemnor cannot enter until he has paid or at least tendered to the landowner the amount of compensation awarded.

A reference to the railroad condemnation statute, as given in the Appendix, will show that there is at present an absence of any statutory provision allowing the execution of a bond in lieu of payment.

**WHEN PAYMENT IS MADE OR TENDERED THE
TITLE PASSES TO THE CONDEMNOR EVEN
THOUGH THERE ARE FURTHER PROCEED-
INGS BY WAY OF APPEAL.**

In Kentucky the right of appeal from a final order in the Circuit Court, in condemnation cases, to the Court of Appeals, rests upon the general provisions of our statute allowing appeals from all final orders of the Circuit Court involving the requisite amount. *Tracy v. E. L. & B. S. R. Co.*, 78 Ky. 309. We will hereafter advert to the special provisions in the telegraph condemnation statute relating to appeals.

However, although an appeal is allowed, yet after a judgment in the circuit court and the payment of the amount awarded the condemnor is, in the language of the statute, "entitled to take possession of said land and material and use and control the same for the purpose for which it was condemned as fully as if the title had been conveyed to him."

The condemnor can either pay the amount fixed by the jury in the county court or in the circuit court; but certainly upon payment of the amount adjudged in the circuit court the provisions of the statute immediately apply. We have seen how

broad these provisions are; that is to say, that the condemnor is entitled to take possession of the land and materials and to use and control the same for the purposes for which they are condemned as fully as if the title had been conveyed to him.

**UNDER THE RAILROAD CONDEMNATION ACT
THE LANDOWNER CAN APPEAL FROM THE
FINAL JUDGMENT BUT CANNOT SUPERSEDE.**

We have noticed above that the right of the landowner to appeal comes from the general provisions of the law authorizing appeals to the Court of Appeals, but it is to be observed that the condemnor has an election. The condemnor can pay the amount fixed, and in that way secure the title, and notwithstanding this election, can still prosecute an appeal. But by satisfying the judgment and assuming possession the condemnor is committed to the payment of whatever amount may be thereafter determined to be the measure of compensation. If, however, the condemnor is not willing to take the risk of having an amount adjudged which it is not willing to pay, it can omit to pay the judgment, prosecute an appeal and, if the result of a new trial is the fixing of an amount beyond what the condemnor regards as reasonable, it can abandon the whole procedure.

It is necessary constantly to have in mind this distinction, viz., a final election by the satisfaction of the judgment and the entering into possession, upon the

one hand, and an appeal without satisfying the judgment or entering into possession, on the other. As indicative, however, of the policy of the statute in permitting the condemnor to satisfy the judgment and thereupon become entitled to use and occupy the property condemned, it is necessary to consider certain decisions governing the right of the landowner to stay this entry into possession and this use and occupancy pending subsequent proceedings.

Tracy v. E. L. & B. S. R. R. Co., 78 Ky. 309, was a case where the landowner appealed with supersedeas. There was a motion to dismiss the appeal and to discharge the supersedeas. The court held that the landowner was entitled to an appeal under the general provisions relative to appeals to the Court of Appeals from final judgments. As to the motion to discharge the supersedeas, the court passed this to the final hearing of the case. The opinion upon the second hearing is reported in Tracy v. E. L. & B. S. R. Co., 80 Ky. 259. The judgment of the court below was reversed but as to the supersedeas the court held that as by the express provisions of the charter of the railroad company it was entitled "to proceed to construct their said road as soon as the first verdict of the jury shall be returned, whether the same be set aside and a new jury ordered or not," there could be no supersedeas.

The court held that the company was authorized to enter as soon as the first verdict was returned and

the compensation paid to the owners or deposited with the sheriff under the control of the court, and hence the supersedeas ought to have been discharged.

It was suggested to the court that if this were the law the condemnor might enter without having the question of necessity determined. In response to this the court said that an injunction would be a perfect remedy for this.

The case was tried under the terms of the charter of the Railroad Company. That charter will be found 1 Acts 1869, 216. We have given in the Appendix the provisions of this charter relating to the acquisition of property by writ of *ad quod damnum*. Briefly stated the method provided was the summoning of a jury by the sheriff; the fixing by this jury of the amount of compensation; the return of the proceedings to the Circuit Court where they were subject to exceptions. The statute provided that the company might proceed to construct the road as soon as the first verdict of the jury should be returned, whether the same might be set aside and a new jury ordered or not; and further provided that the "valuation, when tendered or paid to the owners of the property, shall entitle the company to the use or interest in the property thus valued as fully as if it had been conveyed to it by the owner or owners of same."

It appeared that the Railroad Company had filed a petition before the sheriff for the inquest; that the owner of the land had appeared and filed an answer in which it was alleged that there was no necessity

for the appropriation of the land. No attention was paid to this answer in proceedings by the sheriff, and when the inquest was returned to the Circuit Court no attention was paid to the issue thus made. The Appellate Court held that as a condition precedent to the condemnation of the property necessity must be established, and that the burden to establish necessity was upon the condemnor. This condition precedent to condemnation not having been fulfilled the court, in the instant case, reversed the judgment and sent the case back to the Circuit Court for a new trial.

The case came again to the Court of Appeals and is reported the third time in *Treacy v. E. L. & B. S. R. Co.*, 85 Ky. 271. It there appeared that when the case went back to the Circuit Court that court heard proof as to necessity, and thereupon again confirmed the inquest of the sheriff's jury. The charter was granted January 29, 1869. In 1882 the Legislature passed a general condemnation act applicable to railroads. This Act the Court of Appeals had held to be inconsistent with any special provisions in charters authorizing condemnation. Thus the question arose whether, upon the return of the case to the Circuit Court, it should be tried *de novo* as the Act of 1882 required, or simply tried over again under the charter of the company. The court held that the case should have been tried *de novo* under the Act of 1882, and that this Act was constitutional. The court said:

“If, therefore, the appellee's proceedings in the county were a sufficient compliance with the

conditions precedent to its right to acquire right or title to the land, then the lower court should have re-tried the case under the provisions of the charter, because, in such a case, the appellee, having actually acquired a right to the property, by virtue of its charter remedies, the Legislature could not, by a subsequent Act, repeal the charter remedy so as to change or affect the appellee's vested rights thereunder.

"On the other hand, if the appellee failed to comply with the conditions precedent to its right to acquire right or title to the land, then the court should have proceeded to re-try the case *de novo* under the Act of 1882, because the appellee having acquired no vested right to the land or any interest therein by its proceeding, the repeal of the charter remedy left appellee without a right to proceed further under its charter. And it could only complete its right to condemn the land by conforming its proceedings to the provisions of the repealing Act."

In the case at bar a full trial was had as to the existence of all necessary conditions precedent to the condemnation. We call attention to the following pages of the record: R. 122, 123, 124, 125, and especially 131, 132. We give the findings of fact by the court and its order, pages 131, 132:

Finding of Facts Separately From the Opinion.

Filed January 29, 1916.

"The court having heard and considered the testimony offered by the parties respectively upon the two questions tried by it without a jury and submitted to its judgment on the 24th inst., and having also heard and considered the argu-

ments for the respective parties, makes the following Findings of Fact, namely:

"First. That there is a necessity for the taking by the plaintiff of the easement sought by it herein to be appropriated to plaintiff's use as described in its petition as amended; and

"Second. That such appropriation upon the location sought, and the erection, operation and maintenance in the usual manner of constructing, operating and maintaining telegraph lines on or along or upon the right of way of the defendant, in the manner and upon the location prayed for in the plaintiff's petition as amended, will not interfere with the ordinary use or the ordinary travel and traffic on defendant's railroad.

Order January 29, 1916, in Pursuance of Opinion and Finding of Facts.

"This day came the parties by their respective counsel of record and the court being fully advised on the questions heard by it without a jury and submitted to it on the 24th inst., delivered its opinion in writing thereon, which is filed, and also returned its separate Findings of Fact, which findings are now filed and made part of the record; and pursuant to said opinion and said Findings of Fact it is now considered and adjudged by the court as follows:

"First. That there is a necessity for the taking by the plaintiff of the easement sought by it herein to be appropriated to plaintiff's use as described in its petition as amended; and

"Second. That such appropriation upon the location sought, and the erection, operation and maintenance in the usual manner of construction, operating and maintaining telegraph lines on or along or upon the right of way of the de-

fendant, in the manner and upon the location prayed for in the plaintiff's petition as amended, will not interfere with the ordinary use or the ordinary travel and traffic on defendant's railroad."

It will be observed that the court found for the Telegraph Company upon the issue of necessity, and also upon the issue that the appropriation would not interfere with the ordinary use or the ordinary travel and traffic on defendant's railroad. If such facts had appeared in the case we have just cited—*Treacy v. E. L. & B. S. R. R. Co.*, 85 Ky. 270, the court declared that the Legislature could not even have changed the method of condemnation, much less have destroyed the right thereto.

In *Covington Short-Route R. Co. v. Piel*, 87 Ky. 268, the court decided, as noted above, that the condemnor could not enter upon giving a bond. In the course of this opinion, however, the court said:

"While the statute does not, in express terms, deny to the owner the right to supersede the judgment in a case like this, it provides that the corporation, when taking the appeal, may take possession of the property upon executing a bond to the owner in double the amount of the damages assessed, excluding necessarily his right to prevent the public use by superseding the judgment, and thereby delay the progress of the work until the end of the litigation."

In *Shirley v. Southern Railway Co. in Kentucky*, 81 S. W. 268, 26 Ky. L. R. 368, it was expressly de-

eided that where a railroad had condemned land the landowner, after the damages were paid into court, could not appeal with supersedeas.

It is held in *Hamilton v. Maysville & Big Sandy R. R. Co.*, 27 Ky. L. R. 251; same case 84 S. W., p. 778, that after the tender by the condemnor and a refusal by the landowner, the payment into court is the same as the payment to the landowner.

A most important case is that of *Chicago, St. Louis & New Orleans R'y Co. v. Sullivan*, 24 Ky. L. R. 860, 80 S. W. 791. Here the Railroad Company procured a judgment of condemnation and appealed, paying the money into court. It then attempted to take possession. The landowner resisted. The railroad company filed a bill to enjoin the interference by the landowner with its taking possession. An injunction was granted in the court below and then dissolved, and a motion was made before Chief Justice Burnam to reinstate the injunction. As is customary in Kentucky in cases of this kind Judge Burnam called into consultation with him the whole court. His opinion is therefore entitled to the respect due the opinion of the whole court.

In reviewing the law as to eminent domain, Chief Justice Burnam said:

“We are inclined to the opinion that it was the intention of the Legislature, by the provision authorizing the payment into court of the damages assessed, to provide an easy way to make a tender to the defendant, and that such payment into court was in reality a payment to the

defendant; but as the statute is not perfectly clear on this point, and has not been construed by the Court of Appeals, I feel constrained to adhere to the old rule, and require an actual tender in money before the company is entitled to the possession of the land. *But I entertain no doubt, however, that upon the payment or tender to the defendant that the railroad company is entitled to the immediate possession of the land condemned as fully as if the title had been conveyed to it, even if the defendant elected to prosecute an appeal.* (Our italics.)

“The statute provides that either party may appeal to the Circuit Court by executing bond as required in other cases within thirty days; and that the appeal shall be tried *de novo*. Under this statute the railroad company can prosecute an appeal to the Circuit Court for the purpose of reducing the amount of damages awarded to the defendant notwithstanding previous payment, and the defendant is also given the right of appeal notwithstanding he may have accepted the compensation awarded in the county court proceedings. I am aware that this is a change of the common law rule that a party who has recovered a judgment upon a claim which is indivisible, and collected it, can not maintain an appeal against the objection of the judgment debtor upon the ground that he had not recovered enough. This rule has been abrogated in appeals to this court by the amendment of 1888 to Section 757 of the Civil Code, and in my opinion the Legislature intended also to change this rule in cases of this character, bonds being required to the end that the successful party in the trial *de novo* in the Circuit Court might be secured in the increase or decrease, as the case may be, of the judgment of the county court.

"It follows from these views that the payment by the railroad company to the county court clerk was not equivalent to a tender of the money to the defendant, and until they have done so they are not entitled to take possession of the land in controversy. For reasons indicated the motion to reinstate is overruled."

In a subsequent case—Hamilton v. Maysville & Big Sandy R. R. Co., 27 Ky. L. R. 251, 84 S. W. 778, in speaking of this case, it is said:

"It is true that this case was considered by Burnham, C. J., in chambers, on a motion to reinstate an injunction, but the whole court heard and considered the case with him, and his opinion was delivered as the opinion of the whole court."

Again, in Bushart v. County of Fulton, 183 Ky. 471, at pages 477 and 479, the above opinion of Judge Burnham is quoted almost in full, including the part which we have above emphasized; viz., "But I entertain no doubt, however, that upon the payment or tender to the defendant that the railroad company is entitled to the immediate possession of the land condemned as fully as if the title had been conveyed to it, even if the defendant elected to prosecute an appeal."

As further illustrative of the doctrine we are contending for, viz., that title vests upon payment of compensation, we refer to the case of Madisonville Co. v. Ross, 126 Ky. 138. Here there was a judgment of condemnation and the railroad company ap-

pealed. While the case was in the Court of Appeals the railroad company paid into court the full amount of the judgment and costs, and took out a writ of possession under which the owner was ousted from his property and the railroad company placed in possession. Thereupon the landowner moved to dismiss the appeal but the court denied the motion, saying that the statute clearly recognized the right of the railroad company, after a verdict in a condemnation proceeding, to pay the amount of the verdict into court and take possession of the land, and also to appeal. The court said:

“The value of the statute would be very nearly destroyed if the railroad corporation could not take possession of the property pending the appeal, by paying into court or to the owner the sum assessed as the value of the property.”

In this case no point was made as to the payment's having been made into court instead of to the owner.

Again, in *Beckham v. Slayden*, 107 S. W. 324, 32 Ky. L. R. 944, it appeared that after a judgment of condemnation fixing the damages, but before payment, the condemnor attempted to enter. The landowner then brought suit to enjoin the entry but pending the suit the condemnor tendered the amount of the compensation to the landowner, and thereupon the court below dismissed the landowner's petition. This judgment was affirmed by the Court of Appeals except as to a matter of costs.

In *L. & N. R. R. Co. v. Lang*, 160 Ky. 702, the Court of Appeals of Kentucky had under consideration this telegraph statute. In reference to Section 8 the Court said:

"If the provision of the 8th section, that when the defendant appeals the telegraph company, by executing bond, may take possession without paying the damages, is unconstitutional, its invalidity does not affect the validity of the Act."

By this it appears that the 8th Section as above construed was simply meant to apply to a case where the telegraph company was attempting to take possession without paying the damages, and not to a case where the telegraph company had paid the damages.

IF THE CONDEMNOR DOES NOT SATISFY THE JUDGMENT BUT APPEALS WITHOUT SO DOING IT HAS AN ELECTION TO DISCONTINUE THE PROCEEDINGS AT ANY TIME.

We have heretofore shown that if the condemnor satisfies the judgment it is entitled then and there, under the judgment, to appropriate the property condemned to its use. If, however, the condemnor does not elect to pay the damages and enter into possession, a different principle applies and it has an election to discontinue the proceedings at any time. This is illustrated by the two cases of *Manion v. Louisville Co.*, 90 Ky. 494, and *Sandy Valley & Elkhorn Co. v. Bentley*, 161 Ky. 558.

These cases simply hold that until payment is made by the condemnor it has the option of withdrawing its suit. The distinction is made in the Manion case. Thus the court said (494):

“We think it plain under the statute that the right of the owner to compensation does not attach until the entry of the corporation on the condemned land, nor does the corporation acquire any right to enter until the damages assessed are actually paid or tendered to the owner. It is true that a corporation might accept the terms of the assessment in such a way, regardless of the statute, as would authorize a recovery of the damages by the owner; but we are considering now a proceeding under the statute alone, where there has been no payment or tender of the money or entry by the party causing the condemnation. The statute expressly provides that when the corporation or railway company pays the damages and all costs, or makes a tender to the owner of the amount, the company shall be entitled to enter and use and control the property for the purpose for which it was condemned. The corporation has no interest in the property until this is done, nor is *the owner divested of his title*, in whole or in part, until this provision of the statute has been complied with. As said in *Lamb v. Schottler*, 54 Cal. 327, ‘in a legal sense the land has not been taken until the act transpires which divests the title or subjects the land to the servitude.’ When compensation is made under the statute of this State the title vests, and not before, and the owner of the land holds it up to that time as if no condemnation had taken place.”

In the other case there was the question whether in the trial in the circuit court there should be taken into consideration improvements put on the property by the landowner pending the proceedings, and the court held, in effect, that as the condemnor had not chosen to pay and take possession, all the rights of an owner remained in the condemnee. And this for the reason that "a judgment in a condemnation proceeding does not impose upon the party seeking to condemn the absolute obligation of taking the property."

It is perfectly obvious that this statement was made in reference to a case where the condemnor had not exercised its option of paying the award.

In the case at bar the election was made and everything done that was requisite to secure actual title to the property, the Telegraph Company being willing to encounter the danger of having more to pay, but not being willing to encounter the danger of not presently securing the title. And the court will readily understand how, in the case of any public work, it would be absolutely necessary to go on with construction pending a final result. Surely it can not be true that this construction must await the final determination of the condemnation case in the court of final resort. The same principles apply to all condemnation proceedings.

An important case on this subject is that of Long Fork Railway Company v. Sizemore, 184 Ky. 54. This was a condemnation proceeding. There had

been a trial in the county court, resulting in a verdict fixing the damages at \$5,500. The railway company appealed to the circuit court; deposited the \$5,500 with the clerk of the court; took possession of the land condemned; and at the time of the trial in the circuit court had completed the construction of its railroad, except ballasting the track, and was operating construction trains thereon. The trial in the circuit court resulted in fixing the damages at \$5,700. Thereupon judgment was entered directing the master commissioner to convey to the plaintiff the land condemned, ordering the \$5,500 deposited in court by the railway company to be paid to the landowner, and giving the landowner a personal judgment for the remaining \$200 and costs. The railway company appealed and upon this appeal the court said:

“The Bill of Rights and Section 242 of the Constitution expressly so provide, and Section 839 of the statutes permitting the corporation, after judgment in the County Court establishing its right over the land involved and fixing the damages, to pay the amount assessed into court, take possession of the land and appeal from that judgment was enacted to permit the company to exercise its right of election to take or not the land required by it, before a final determination of the damages it must pay therefor, as to which question both parties are given the right of appeal; but even this right to take possession before final determination and payment of the damages may be exercised by the corporation only where the

owner waives his constitutional right of actual previous payment to him or where the deposit in court amounts to a tender. (*Bushart v. County of Fulton*, 183 Ky. 471; *Carrieco v. Colvin, etc.*, 92 Ky. 342; *Covington S. R. T. R. Co. v. Piel*, 87 Ky. 267; *Chicago, St. L. & N. O. R. R. Co. v. Sullivan*, 24 Ky. L. R. 860; *Hamilton v. Maysville & B. S. R. R. Co.*, 27 Ky. L. R. 251; *Beckham v. Slayden*, 32 Ky. L. R. 944.)

"Appellant having exercised its right of election and taken possession of the land in which appellees have acquiesced, doubtless because of the deposit in the court and the bond for the appeal, and the deposit having been made by appellant under Section 839 of the statutes 'subject to the order of the court,' it can not thereafter make another and different election with reference to taking the land, nor can it object to the court ordering the payment upon final judgment of that deposit to the landowners. Neither can it object to the personal judgment against it for the excess of the damages finally awarded over the deposit, because that was the very question the proceedings, after the question of possession had been disposed of by the action and acquiescence of the parties, submitted for adjudication. Neither party is objecting to that part of the judgment directing the master to convey the land condemned to appellant, and after appellant has forcibly taken from appellees the possession of their land by this proceeding and procured judgment for title thereto as well, it would be a peculiarly unwarranted conclusion indeed that would deny to the court having jurisdiction of the parties and the subject matter, the right to dispose of the whole litigation by making effective by its judgment the verdict of the jury on the very issue submitted to it. Hence there is no merit in the contention the court erred in the personal judgment against appellant."

It is obvious that what is said in regard to the acquiescence, express or implied, of the landowner in the railroad's taking possession was simply to show that after thus acquiescing the landowner could make no point upon the money's having been paid into court rather than to him.

**IS THE TELEGRAPH STATUTE CONSTITUTIONAL
IN PERMITTING DAMAGES TO BE PAID INTO
COURT IN CASE THERE ARE MORTGAGES
UPON THE PROPERTY?**

We have given the cases decided by the Court of Appeals of Kentucky as to the necessity of payment to the landowner, and as to the unconstitutionality of a statute which allows the payment of the damages into court. These cases, however, are under the railroad condemnation statute and that statute makes no provision for any case except where there is a known owner. It is further to be observed that although the constitutionality of this telegraph statute has been repeatedly attacked in the litigation between the present parties it has always been held to be constitutional. This is not to affirm that this particular clause has been adverted to. The act has been declared generally constitutional in *Louisville & Nashville R. R. Co. v. Western Union Tel. Co.*, 207 F. R. 1; in *Louisville & Nashville R. R. Co. v. Western Union Tel. Co.*, 249 F. R. 385 (this case); and in *Louisville & Nashville R. R. Co. v. Lang*, 160 Ky. 702.

But in none of the cases above referred

to was there any uncertainty as to the person to whom the money should go, nor any encumbrance upon the land of any character. In other words, the decisions of the Court of Appeals up to this time have simply dealt with the case of a condemnor and a known owner of unencumbered property, where, upon the payment or tender of the money to such known owner, the condemnor would obtain a full and unencumbered title.

In the case at bar the telegraph statute contemplates proceedings where there are mortgages upon the property sought to be condemned, and provides that in that case the money shall be paid into court, so that the mortgagees may obtain it if they so desire, and that the mortgagor can withdraw it by presenting a release of the mortgages.

Is this statute constitutional?

Many cases might be imagined where the owner of property would not be known and where, therefore, the payment could not be made, or where it was absolutely necessary to the justice of the case to impound the money. We suggest a case that may often happen:

Land held under a title by a tenant for life with remainder to such persons as shall at his death be his heirs at law. Condemnation proceedings in such a case as this could be had against the life tenant and the persons who, if the life estate were presently to fall in, would be entitled to the property, these persons standing as representatives of the contin-

gent remaindermen. But it is obvious that these persons would not be entitled to the money, and that there would, therefore, be nobody to whom the condemnor could pay the money.

Again, there may be a dispute as to the title to the land. One man may be in possession and another claiming title. In such a case as this it would be impossible for the condemnor to pay either of the parties unless the court, in the condemnation proceedings, would proceed to ascertain the merits of the conflicting claims.

Again, as in the case at bar, the property might be subject to encumbrance. It would be certainly impossible under the machinery provided by this condemnation statute to determine the relative rights of these eight mortgagees (R. 48-50), even if they had all been made parties. And it must be obvious that the necessity for a prompt determination of condemnation suits can not wait upon the many issues that might be raised between conflicting claims of mortgagees.

The question, therefore, before the court is this:

Admitting that where there is a condemnor and a known condemnee the condemnor must pay or tender to the condemnee the amount of compensation adjudged, and that in such case a statute authorizing the condemnor to pay the money into court is violative of the Constitution, does this rule apply in cases where either the title to the land is uncertain or held in diverse interests, or where the land is encum-

bered either by mortgages or other liens such as judgment or tax liens?

This question has never been decided in Kentucky, and we have, therefore, necessarily, to look to other jurisdictions for authorities upon the point.

The constitutions of the various States and the statutes upon the subject of eminent domain are so diverse that it is difficult to find a State wherein the question has arisen and wherein the principles of law applicable thereto exactly fit the situation in Kentucky. We submit that such a State is found in New Jersey.

We restate, for the purpose of clearness, that there is no doubt that upon the entry of the judgment fixing the value of the land taken, and the payment of that judgment, the title to the land then and there vests in the condemnor, and that after this election by the condemnor to pay the amount of compensation fixed he can not escape taking the land even though upon appeal the amount of this compensation is increased.

The Constitution of New Jersey provides:

“Private property shall not be taken for public use without just compensation”; and

“Individuals or private corporations shall not be authorized to take private property for public use, without just compensation first made to the owners.”

In *Redman v. Philadelphia, Marlton and Medford R. R. Co.*, 33 N. J. Eq. 165, an effort was made

by a railroad company to take possession of land which it had condemned but instead of paying the money to the landowner it paid it into court. Thereupon the landowner brought suit to enjoin. The vice chancellor granted the injunction, holding that a section in the railroad charter providing that payment might be made into court was unconstitutional, and in the course of his opinion said (p. 167):

“The new enactment, as I understand it, says plainly that if the corporation appeal from the finding of the commissioners, they shall be authorized, on paying the money into court, and without making payment or tender to the landowner, *though he is known and of full capacity, and his title is unquestioned, to appropriate his lands.*” (Our italics.)

Again (p. 168):

“I think it will be very difficult to find a single instance, before the present, where the Legislature, since the adoption of the present constitution, have granted to a private corporation the power to exercise the right of eminent domain, except on condition that payment or tender of compensation should precede appropriation, *if the person entitled to it was known and of full capacity, and his title was free and unquestioned.* (Italics ours.) There may be such instances; but if they exist, it is certain the power thus granted has never been exercised in defiance of the will of the landowner. Under charters containing the condition above mentioned, the courts of this State have repeatedly held that the corporation acquired no right to appropriate the land until compensation was

first made either by payment or tender'' (citing many cases).

Thus far we have the New Jersey Constitution and this New Jersey authority in exact consonance with the Kentucky Constitution and the Kentucky authority. But suppose that the owner is not known or is not of full capacity or that his title is not unquestioned—then is there no power in the Legislature to protect the condemnor? Without question, we believe the Legislature of New Jersey has provided a lawful means to protect the condemnor under such circumstances.

An interesting case is that of *Platt v. Bright*, 31 N. J. Eq. 81, affirmed in *Bright v. Platt*, 32 N. J. Eq. 362. In this case there had been a condemnation of land by a railroad and the money, pursuant to an act of the Legislature, paid into the chancery court, it appearing that there was a mortgage upon the property. The court held that although the mortgagee was not a party to the condemnation proceedings yet the result of the judgment in the case was to value every estate in the property; that the railroad company had the right to protect its equity by insisting that the mortgagee should, so far as the fund would suffice, subject it to his lien.

In *Johnson v. Baltimore & N. Y. R'y Co.*, 17 Atl. 574, 44 N. J. Eq. 454, it appeared that there was a condemnation of certain property subject to mortgage. The mortgagee refused to allow the money to be paid to the mortgagor, and the mortgagor refused

to allow the money to be paid to the mortgagee. Thereupon the money was paid into court and the learned Vice Chancellor held that this was equivalent to a payment. Calling attention to the statute the court remarked (p. 575):

“The validity of this statute, as a constitutional exercise of legislative power, is not assailed or questioned; so it would seem to be clear that the court, in considering the question whether an injunction shall be granted or not, must look at the case exactly as it would if the fact was that an actual tender had been made on the 3rd of April, 1889, of the sum awarded by the Commissioners, and the complainant had refused to receive it.”

There is a similar holding in *In re Sleeper*, 49 Atl. 549, 62 N. J. Eq. 67. In this case the railroad company, having secured a judgment in condemnation and ascertaining that there were certain taxes on the property, paid the money into court under the Act which we have above referred to. The learned vice chancellor held that there was no essential difference between the lien of taxes upon land and the lien of a mortgage or judgment, and therefore the railroad company had the right to protect itself by the payment of money into court.

See also: *Herr v. Board of Education*, 82 N. J. L. 610 (83 Atl. 173); *Bowers v. Town of Bloomfield*, 81 N. J. E. 163 (86 Atl. 428).

The citation of these cases from New Jersey would seem to be sufficient to establish the principle

we are now contending for; that is, that where there is doubt as to the owner; where there is an encumbrance upon the land; where, for any other reason, a payment can not be safely made by the railroad company to the defendant, a statute allowing the payment into court is entirely constitutional. Indeed we make bold to say that even if there were no such statute the railroad company would have the right to pay the money into court upon the showing that a payment to the landowner would not give to it an unencumbered title. But however that may be, in the case at bar this telegraph statute does give this right, and the only question is, is it constitutional? If constitutional, then the payment into court was a payment equivalent to a payment to the Railroad Company, so far as vesting the title in the Telegraph Company.

We respectfully submit that there is nothing in the decisions of the Court of Appeals of Kentucky which would lead us to believe that it would not acquiesce in the doctrine laid down in the courts of New Jersey.

We further submit that under the decisions of the Court of Appeals of Kentucky, judgment of condemnation having been entered and payment made in the manner authorized by law, full title then and there vested in the Telegraph Company, and appeals from such judgment had simply the effect of presenting for determination the question whether the com-

pensation to be paid by the Telegraph Company was more or less than that embraced in the judgment.

If the provision in regard to payment of money into court in the telegraph act is constitutional, then it would seem that this was the end of the case.

It is, however, argued that by the reversal of the judgment in the condemnation case all that has been done was annulled. It is obvious that if a condemnation case were like a suit in ejectment there would be ground for such an argument. In such a suit, if the plaintiff had judgment, he would be entitled to sue out his writ of possession unless the defendant should suspend its execution by giving a supersedeas bond. If the judgment was reversed then the plaintiff would be compelled to restore possession to the defendant. But there is absolutely nothing in the jurisprudence of Kentucky, nor, so far as we are aware, in the jurisprudence of any other state, which would lead to the conclusion that a condemnor, having through the proper proceedings fixed the amount of compensation due to the landowner, and paid the same and entered into possession, could be ousted from this possession on account of the reversal of the judgment. For it is not possession alone that is acquired by the judgment in condemnation. And as we have seen no supersedeas is allowed.

Thus in the railroad statutes it is provided, as we have heretofore quoted, that upon the payment to the owners of the amount due "the railroad company shall be entitled to take possession of said land and

material, and to use and control the same for the purpose for which it was condemned, as fully as if the title had been conveyed to it."

In the case we have cited above the Court of Appeals of Kentucky, through Chief Justice Burnam, said:

"I entertain no doubt, however, that upon the payment or tender to the defendant, that the railroad company is entitled to the immediate possession of the land condemned as fully as if the title had been conveyed to it, even if the defendant elected to prosecute an appeal."

We have seen that this opinion has been twice approved by the Court of Appeals.

The telegraph statute fixes the form of judgment as we have given it:

"Now upon payment of said award *either* to the defendant *or* to the clerk of this court, and all costs in this behalf expended, said telegraph company may enter upon said land and appropriate so much thereof as may be necessary, as prayed for in its petition."

And in the judgment herein it is provided:

"It is adjudged that the petitioner is to have the right perpetually to construct, maintain and operate its lines of telegraph, consisting of poles, wires and fixtures, over, upon and along said right of way above described, and to occupy said right of way * * * and to maintain and operate its said line of telegraph where now placed and located."

And again it is provided in said judgment:

"Upon payment of the above award either to the defendant, Louisville & Nashville Railroad Company, or to the clerk of this court, and all costs in this behalf expended by defendant, the petitioner, the Western Union Telegraph Company, may continue in the occupancy of said property of the defendant Railroad Company, and continue to appropriate so much thereof as is above described."

We do not contend that this takes away from the court the power, upon a new trial, to adjudge a different measure of recovery; but we do insist that under and by virtue of this judgment, which was in full force and effect when the statute now under consideration was passed, the Telegraph Company was vested with an absolute, indefeasible title to the easement which it had condemned and for which it had paid in whole, or, as might be subsequently determined, in part.

**SECTION 8 OF THE TELEGRAPH STATUTE HAS
NO APPLICATION TO THIS CASE.**

Some reference was made in the opinion of the Circuit Court of Appeals to Section 8 of the condemnation statute, under which these proceedings were instituted. This Section 8 is as follows:

"That either party shall have the right to appeal from said judgment to the Court of Appeals, within thirty days after the rendition of said judgment, upon entering into bond with

sureties, to be approved by the court or judge in vacation in the sum of two hundred dollars, conditioned to pay all costs that may be adjudged against it if said cause shall be affirmed. But an appeal by the defendant *shall not operate as a supersedeas* provided the telegraph company shall enter into bond with sureties to be approved by the court in double the amount of the award payable to the defendant in case said cause shall be reversed, and *upon the execution of such bond may construct its telegraph line upon the right of way as prayed for in its petition.*" (Italics ours.)

If this clause of the statute is constitutional we should draw a conclusion therefrom exactly opposite to that suggested by the Circuit Court of Appeals. It has, however, we believe, no relevancy whatever, for the following reasons:

(1) This clause of the statute is probably unconstitutional. It was so urged by the Railroad Company before the Circuit Court of Appeals in the injunction proceedings (Louisville & Nashville R. R. Co. v. W. U. Tel. Co., 207 F. R. 1), and before the Court of Appeals of Kentucky in the prohibition proceedings (L. & N. R. R. v. Lang, 160 Ky. 702).

The Circuit Court of Appeals, at 207 F. R. 10, said:

"By Section 8 of the telegraph condemnation statute an appeal by the railroad company is not allowed to operate as a supersedeas, provided the telegraph company give bond in double the amount of the award payable in case the judgment shall be reversed; while under Section 242 of the state constitution municipal and other

corporations generally, as well as individuals, invested with the right of taking private property for public use are required to make compensation before the property is taken, injured or destroyed. This provision of Section 8 is apparently unconstitutional; but, in our opinion, it does not necessarily affect the validity of the remainder of the act."

In the Lang case the Court of Appeals of Kentucky said, at page 706:

"If the provision of the 8th section, that when the defendant appeals the Telegraph Company, by executing bond, may take possession without paying the damages, is unconstitutional, its invalidity does not affect the validity of the act."

But all this aside—

(2) This Section 8 only applies if an appeal is taken within thirty days after the rendition of the judgment. The judgment was rendered February 16, 1916, although by its terms it was suspended until April 5, 1916, in order to give to either party the right to move for a new trial (R. 144). The judgment was satisfied March 8, 1916 (R. 144). The writ of error was not sued out until June 29, 1916 (R. 146).

(3) In *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239, proceedings under the condemnation laws of the State of Kentucky are declared to be civil actions.

We had always supposed that the following proposition was undisputed:

“Since the act of June 1, 1872, c. 255, Section 5, indeed, the practice, pleadings and forms and modes of proceeding, in actions at law in the Circuit and District Courts of the United States, are required to conform, as near as may be, to those existing at the time in like causes in the courts of record of the State within which they are held, any rule of court to the contrary notwithstanding. 17 Stat. 197; Rev. Stat., Sec. 914. But this act does not include the manner of bringing cases from a lower court of the United States to this court. *Chateaugay Co.*, petitioner, 128 U. S. 544; *Fishburn v. Chicago, &c., Railway*, 137 U. S. 60.” (*Hudson v. Parker*, 156 U. S. 277.)

This doctrine is again asserted in *Camp v. Gress*, 250 U. S. 308, at p. 318.

Under Section 1007 of the Revised Statutes a judgment cannot be superseded unless a bond is executed to that effect within sixty days from the time the judgment was rendered. Whether we date from February 16, 1916, the day the judgment was rendered, or from April 5, 1916, up to which time the judgment was suspended, the writ of error was not sued out within sixty days, and therefore the Railroad Company had no right to execute a bond with supersedeas. Accordingly it will be observed from R. 146 the writ of error was allowed “upon the defendant giving bond according to law in the sum of \$500, said bond not to operate as a supersedeas.” And the bond, which appears on p. 147 of the Record, is simply a bond for costs.

Whatever, therefore, may have been the right of the Railroad Company to prevent the vesting of the title under this judgment by suspending it, this could only have been done either (1) under Section 8 of the statute, by an appeal taken within thirty days after the judgment; or (2) under the Federal statute, by the execution of a bond with supersedeas within sixty days after the rendition of the judgment.

EFFECT OF THE REVERSAL OF THE JUDGMENT OF FEBRUARY, 1916.

A few words in regard to the effect of the reversal. It is true that in all condemnation proceedings there is a question of necessity to be determined, and the Telegraph Statute indicates this in its first clause.

In reference to this it was insisted in the condemnation case, on writ of error to the Circuit Court of Appeals, that this question should have been left to the jury. We quote the following from the opinion of the Circuit Court of Appeals (249 Fed. Rep. 401):

“We do not find it necessary to decide the question” (which we have above stated) “which the Railroad Company presents so far as concerns the broad issues of necessity and of the forbidden general interference. The undisputed facts here lead to the inevitable inference that what ever precedent general necessity the law contemplates was present, and that there would not be any such universal, necessary, and serious

interference as would broadly forbid condemnation generally. *St. Louis Co. v. Southwestern Co.* (C. C. A. 8), 121 Fed. 276, 285, 286, 58 C. C. A. 198. Upon these issues it would have been the duty of the court to instruct the jury to find for the Telegraph Company and so it is quite immaterial whether the Railroad Company was entitled to a jury trial upon them.

“However, we infer from the record (the specific question has not been argued) that there are comparatively small fractions of the desired right of way as to which it may be reasonably claimed that the interference with the railroad use is too serious to permit condemnation. For illustration, there may be bridges or tunnels or other structures or short sections of the right of way already so fully occupied that there is no room for another telegraph line in addition to that to which the railroad is entitled for its own use—that is to say, where another line cannot be so placed that it will not substantially obstruct the use by the railroad of its right of way for some railroad purpose. It is not important to examine the details of the present record in this respect. Before another trial is had, conditions may have changed; and in view of the constant probability of such changes and the shifting character which we have ascribed to the easement to be condemned, the judgment finally entered will necessarily speak as of its date in fixing the specific location of the line of telegraph poles and in adjudging that particular location to be requisite; and a change in location thereafter could be demanded by the railroad only because of conditions later arising. Hence it appears that, upon the new trial, disputable questions of necessity—*i. e.*, the forbidden degree of interference—may be found to exist as to specific locations here and there upon the

line, regardless of whether the controlling conditions existed at the former trial or have arisen since. If the railroad company's telegraph line at these spots can be built—or, if already built, can be operated—with reasonable safety and without prohibitive expense, then an award of damages will meet the case; if not, these particular locations should be exempted from the condemnation. The judgment to be entered must also recognize the necessary change of location in all instances that have developed up to that time, where, under the principles which we have announced, the railroad had become entitled to require such change."

We do not think it necessary to quote further from this opinion. The court holds that the question of necessity is one for the court. This is the Kentucky law. *Warden v. M. H. & E. R. R. Co.*, 125 Ky. 644, 649. The Circuit Court of Appeals constantly speaks of a "comparatively small fraction," or "comparatively small fractions." The learned court said that the specific point had not been argued. It is hardly to be supposed that on a new trial there would be found any tunnel through which the wires of the Telegraph Company would be stretched. It is a well known fact that the telegraph wires go over and not through tunnels, for the obvious reason that the smoke in the tunnel would deteriorate the wire; and it would also be difficult to get at the structures for their repair.

Whether on a new trial there would turn out to be such small fractions is problematical. There might not be any, but if any, they would be insignifi-

cant; and surely the possibility that there might be some is a most unstable foundation for the authority of the Legislature to deprive the Telegraph Company of its title to 942 miles of right of way which it has condemned and which it has paid for. And that in face of the fact that upon such new trial the jury can find another amount in compensation and the Telegraph Company will be compelled to pay it.

Nor is there any danger that the Telegraph Company becoming insolvent would be able to hold this right of way without paying the amount adjudged. In Tennessee the condemnation statutes formerly allowed a railroad company to enter before taking any proceedings whatever in condemnation, and then provided for an inquiry of damages at the instance of either the railroad company or the landowner. But the court very properly held that upon the failure of the railroad company to pay the amount so adjudged equity would require the railroad company either to make the payment or abandon the property. *Parker v. E. T. V. & G. R. R. Co.*, 81 Tenn. 669 (13 Lea, 669). See also *Tracy v. E. L. & B. S. Co.*, 80 Ky. 259 (at 269).

We submit, therefore, on the first point, that this act of March, 1916, is unconstitutional both under the first clause of the Constitution of the State, which declares that among other certain inherent and inalienable rights is the right of acquiring and protecting property, and under the Fourteenth

Amendment to the Constitution of the United States whose familiar language it is not necessary to quote.

THIS STATUTE CANNOT BE GIVEN A RETROACTIVE EFFECT.

In Kentucky there is a statute (Section 465) reading as follows:

“§465. No new law shall be construed to repeal a former law as to any offense committed against the former law, nor as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture, or punishment so incurred, or any right accrued or claim arising before the new law takes effect, save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. If any penalty, forfeiture, or punishment be mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect.”

The applicability of this provision of the Kentucky Statutes can be seen if we will leave out such parts of it as are not relevant to the case at hand. The statute would then read as follows:

“No new law shall be construed to repeal a former law as to * * * any right accrued or claim arising under the former law or in any way whatever to affect any right accrued or claim arising before the new law takes effect.”

There are two matters to be here considered :

(1) If the Telegraph Company had any right accrued or claim arising under the former law then this new law should not be construed to repeal the former law as to any such right accrued or claim arising under the former law.

(2) This statute should not be construed in any way whatever to affect any right accrued or claim arising before the new law takes effect.

This Section 465 of the Kentucky Statutes is under a chapter headed "Construction of Statutes" (sometimes called the "Dictionary Chapter"). The learned Circuit Court of Appeals says :

"In any event Section 465 does no more than lay down a canon of construction for doubtful cases." (268 F. R. 7.)

We submit that this was very far from the object of this statute. Its purpose was to require the Legislature, if it meant to make a law retroactive, to say so in plain terms. There are many cases where laws for the future will be favorably considered by members of the Legislature when they would not be passed if understood as an attempt to control either pending litigation or rights accrued or existing under former laws.

There can be no doubt that in some cases the Legislature can give a retroactive effect to its laws. Thus it can repeal its penal laws and provide that the repeal shall take away all right to recover penal-

ties for past infractions of the repealed law. It will not be disputed, however, that if a penal law is repealed or the penalty changed, by virtue of this Section 465 the law will be construed as having a prospective and not a retroactive effect; and the language used in this particular act (of 1916) (Section 2) "that all acts and parts of acts in conflict with this act be and the same are hereby repealed," has no effect whatever in taking the new law out of the terms of Section 465. Many cases might be cited to this effect:

Commonwealth v. Sherman, 85 Ky. 692.
 Waddell v. Commonwealth, 84 Ky. 280.
 Acree v. Commonwealth, 13 Bush, 353.
 Commonwealth v. Overby, 107 Ky. 172.
 Coleman v. Commonwealth, 160 Ky. 87.
 Albritten v. Commonwealth, 172 Ky. 274.
 Fuson v. Commonwealth, 173 Ky. 242.

It will be found upon examination that every one of the acts referred to in these cases contained a general repealing clause of all inconsistent legislation, similar to the second section of the act now in controversy; and yet it was held in each of these cases that Section 465 controlled. It was for this reason that the second section of the law in the Pannell case was written as it appears, viz., that "no penalty provided in said act shall hereafter be recoverable in any court of the Commonwealth." On the contrary, the Act of 1916 under consideration has the simple formula which is used in the cases above cited; that is, a general repealing clause of

all inconsistent legislation—which is held in these cases not to take the Act out of the purview of Section 465.

That the effect of Section 465 was far from being simply a canon of construction in doubtful cases appears by the latest decision of the Court of Appeals of Kentucky construing this section: *Commonwealth v. Louisville & Nashville R. R. Co.*, 186 Ky. 1. We quote the first clause of the syllabus:

“According to the rule of the common law, the repeal of a statute destroyed the right to enforce a penalty for its violation, which was incurred before its repeal, but the statute, Section 465, Ky. Statutes, modified this rule, and a repealing statute must now be construed with Section 465, and unless it was manifestly intended by the Legislature, in enacting the repealing statute, to destroy, after the repeal, the right to enforce penalties incurred for violations of the repealed statute, before its repeal, the courts may enforce the penalties after the repeal.”

The statute here construed had the usual clause, “All laws and parts of laws in conflict herewith are hereby repealed”; and yet this language was not held to prevent the enforcement of penalties incurred under the old law.

An interesting application of a statute similar to this is made in the case of *Great Northern Railway Company v. United States*, 208 U. S. 452. The court there considers how the reservation section of the Revised Statutes of the United States (Section 13) is to be dealt with in considering the question wheth-

er a new law has affected offenses committed during the existence of the former laws. We think the first clause of the syllabus correctly states what was decided by the court:

"The provisions of Sec. 13, Rev. Stat., that the repeal of any statute shall not have the effect to release or extinguish any penalty incurred under the statute repealed, are to be treated as if incorporated in, and as a part of, subsequent enactments of Congress, and, under the general principle of construction requiring effect to be given to all parts of a law, that section must be enforced as forming part of such subsequent enactments except in those instances where, either by express declaration or necessary implication such enforcement would nullify the legislative intent."

There is a special reason why this Section 465 should be applied to this litigation.

IT IS A SETTLED PRINCIPLE OF KENTUCKY JURISPRUDENCE THAT THE LEGISLATURE CANNOT, PENDING A CONTROVERSY BETWEEN TWO LITIGANTS AS TO THEIR RIGHTS, PASS ANY LAW AFFECTING THE DECISION OF THE CASE.

The following cases sustain this proposition:

Gaines v. Gaines, 9 B. M. 295.
 Cabell v. Cabell's Admr., 1 Metcalfe (Ky.), 319.
 Allison v. L., H. C. & W. R'y Co., 9 Bush, 247.
 Thweatt v. Bank of Hopkinsville, 81 Ky. 1.
 Norman v. Boaz, 85 Ky. 557.
 Marion County v. L. & N. R. R. Co., 91 Ky. 388.
 Turner v. Town of Pewee Valley, 100 Ky. 288.

We call attention to the opinion of District Judge Walter Evans in reference to this, with the suggestion that Judge Evans has been a lifelong lawyer in Kentucky and familiar with its jurisprudence. His discussion will be found at R. 174 and following pages. We do not see how we can add to the force of the opinion of the learned District Judge.

An attempt was made to explain these cases by showing that they might have been decided upon some other ground. But the inquiry should be not how the court might have decided these cases but how the court did decide these cases, and what principle of law the court has time and again laid down as applicable to legislation which attempts to aid either of the parties contending for their rights in a court of justice.

The court below held that none of these cases were applicable and that the rule of law laid down in them did not apply to the instant case because of a decision of the Court of Appeals of Kentucky in the case of *Pannell v. Louisville Tobacco Warehouse Company*, 113 Ky. 630. A reading of that case will disclose that no one of the authorities which we have above cited is referred to in the opinion, although all these cases had been decided prior to the decision of that case. It cannot be said, therefore, that the Pannell case was meant in any way to infringe on the authority of these other cases.

This Pannell case was a simple one. A *qui tam* action had been brought to recover a penalty. Judg-

ment had been obtained below and while the case was in the Court of Appeals the Legislature not only repealed the penal law but expressly provided that no penalty under it should be recoverable in any court of the Commonwealth. The following is the Pannell act in full:

"Section 1. That an Act entitled 'An Act to regulate the sale of leaf tobacco in this Commonwealth,' approved April 3, 1892, be and the same is hereby repealed.

"Section 2. That no penalty provided in said Act shall hereafter be recoverable in any court of the Commonwealth."

In the first opinion delivered the Circuit Court of Appeals said:

"We may add that further consideration of the case of Marion (should be "Manion") v. Louisville, etc., *supra*, seems to lead us inevitably to the conclusion that we are adopting. It was there held that the railroad company, prosecuting condemnation, could abandon the proceedings at any time, because it was merely exercising authority delegated by the state, and it should have the same right to abandon which the state concededly had. The statute of 1916 was only a method of directing the abandonment of all proceedings pending under the 1898 statute. The Manion case can be distinguished only by saying that the agent may abandon but the principal may not." (L. & N. R. R. Co. v. Western Union Co., 268 F. R. at p. 13.)

Now the trouble about all this is that the Manion case does not decide that after the railroad company

(or the telegraph company) had paid or tendered to the owner the amount of damages found by the jury it could abandon all condemnation proceedings. On the contrary the exact opposite is true. We give anew an extract from that opinion:

“We think it plain under the statute that the right of the owner to compensation does not attach *until the entry of the corporation on the condemned land, nor does the corporation acquire any right to enter until the damages assessed are actually paid or tendered to the owner.* It is true that a corporation might accept the terms of the assessment in such a way, regardless of the statute, as would authorize a recovery of the damages by the owner; but we are considering now a proceeding under the statute alone, where there has been no payment or tender of the money or entry by the party causing the condemnation. *The statute expressly provides that when the corporation or railway company pays the damages and all costs, or makes a tender to the owner of the amount, the company shall be entitled to enter and use and control the property for the purpose for which it was condemned.* The corporation has no interest in the property until this is done, nor is the owner divested of his title, in whole or in part, until this provision of the statute has been complied with. As said in *Lamb v. Schottler*, 54 Cal. 327, ‘in a legal sense the land has not been taken until the act transpires which divests the title or subjects the land to the servitude.’ When compensation is made under the statute of this State the title vests, and not before, and the owner of the land holds it up to that time as if no condemnation had taken place.” *Manion v. Louisville, &c., Co.*, 90 Ky. 494. (Italics ours.)

When once the election is made by payment it is a final election upon the part of the railroad company (or the telegraph company as the case may be), and a personal judgment can be rendered against the condemnor for any damages in excess of those which it has paid.

The Pannell case cannot be applicable for the reason that the Telegraph Company had, by the judgment and the performance of that judgment, acquired—not possession simply but the “appropriation” of the designated easement.

CONCLUSION.

In conclusion we submit that the law only allows condemnation proceedings in case of public use. It is essential that they shall be conducted in a way to reach a result that will be of practical benefit to the public. A railroad company or a telegraph company institutes these proceedings. It has a determination by the proper tribunal (the court) that there is a necessity for the appropriation of a particular property. It has a determination by a proper tribunal of the amount of compensation to be paid to the owner of that property. It fully complies with the judgment. Under the terms of the law it is thereby entitled to appropriate the property. The landowner, however, is not satisfied with the amount awarded him and prosecutes an appeal. He cannot stay the judgment because it is necessary that the appropri-

tion if made at all shall be promptly made. He can, however, by an appeal, secure, if there has been error in the proceedings leading to the award, a greater compensation. In the meantime the railroad company or the telegraph company, exercising an undoubted legal right, enters and builds, whether it be a railroad line or a telegraph line. Years may be consumed in appeals to higher tribunals. If it is within the power of the Legislature to arrest these proceedings at any time it chooses so to do, take away from the condemnor all right acquired by the proceedings, then it must follow that upon legislative fiat a right must arise in the condemnee to expel the telegraph company or the railroad company from the property which it has used in the building of its lines. This will render of no value any structures put thereon, and cut the line of the railroad or telegraph in two. In other words, the Legislature, by a simple fiat, can turn a rightful possession into a wrongful one and render valueless the improvements put upon the condemned property, and vest their ownership in the landowner. Under such a system the building of railroad or telegraph lines would be impossible so far as they were dependent upon the use of the writ of *ad quod damnum*. And there are always instances in the building of any railroad or telegraph line where it is absolutely necessary to use this writ.

We respectfully submit that the judgment of the lower court should be reversed so that there may be a new trial upon the question of the amount of com-

pensation to be paid to the Railroad Company for the appropriation by the Telegraph Company of the easement vested in it by the judgment rendered in this case in February, 1916.

Respectfully submitted,

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